Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

NEW YORK STATE BOARD OF ELECTIONS,

Petitioner,

v.

ANITA LERMAN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Buckley v. American Constitutional Law Foundation Inc.*, 525 U.S. 182 (1999), the Court held that a state statute requiring circulators of ballot initiative petitions to be registered voters violated the First Amendment. The question presented here is:

Should *Buckley* be extended to invalidate state statutes requiring that witnesses, or circulators of candidate nominating petitions for primary elections be registered voters in the political subdivision the candidate seeks to represent?

PARTIES TO THE PROCEEDING

The petitioner is the New York State Board of Elections, in its official capacity, comprised of four Commissioners: Carol Berman, Chairperson, Neil Kelleher, Evelyn J. Aquila and Helena M. Donohue.

Also named as respondents below, but not bringing this appeal, are George A. Pataki, Governor of the State of New York, and the Board of Elections of the City of New York.

Respondents are Anita Lerman, who witnessed a petition for a city council candidate in 1999; and Angelo D'Angelo and Pio D'Agostino, who signed the petition witnessed by Ms. Lerman.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Cited Authorities	iv
Table of Appendices	vi
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	3
Reasons for Granting the Writ	4
New York's residency requirement does not place a severe burden on First and Fourteenth Amendment rights and therefore should not be subject to strict scrutiny.	5
Conclusion	8

TABLE OF CITED AUTHORITIES

Page

Cases:

Buckley v. American Constitutional Law Foundation Inc., 525 U.S. 182 (1999) ..... i, 5, 6

Burdick v. Takushi, 504 U.S. 428 (1992) 7, 8

Jenness v. Fortson, 403 U.S. 431 (1971) 7

Molinair v. Powers, 82 F. Supp.2d 57 (E.D.N.Y. 2000) 5, 6

Storer v. Brown, 415 U.S. 724 (1974) 6

Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997) 8

United States Constitution:

First Amendment ..... i, 1, 4, 5

Fourteenth Amendment 1, 2, 4, 5

Statutes:

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 4

Cal. Elec. Code § 8106(b)(4) 4

Cited Authorities

	Page
Colo. Rev. Stat. § 1-4-905	4
Conn. Gen. Stat. § 9-410	4
D.C. Code § 1-1312	4
10 ILCS 5/7-10	4, 5
Kan. Stat. § 25-205	5
Mich. Stat. Ann. § 544(3)	5
Neb. Rev. Stat. § 32-629	5
Ohio Rev. Code § 3503.06	5
25 Pa. Cons. Stats. § 2869	5
RI Gen. Laws § 17-23-12	5
VA Code § 24.2-521	5
18 VI Code Ann. § 346(1)	5
Wis. Stat. § 8.40(2)	5
New York State Election Law § 6-132	*passim*
New York State Election Law § 6-132(2)	3, 6
New York State Election Law § 6-132(3)	3, 6

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Second Circuit Dated, Decided And Filed November 9, 2000 ..... 1a

Appendix B — Transcript Of Civil Cause Of The United States District Court For The Eastern District Of New York For Order To Show Cause Dated August 31, 1999 ..... 35a

Appendix C — Order Of The United States District Court For The Eastern District Of New York Dismissing Plaintiff's Complaint Dated September 1, 1999 ..... 55a

Appendix D — Judgment Of The United States District Court For The Eastern District Of New York Dismissing Plaintiff's Complaint Dated And Filed September 3, 1999 ..... 56a

Appendix E — Order Of The United States Court Of Appeals For The Second Circuit Denying Petition For Rehearing Dated And Filed December 13, 2000 ..... 58a

The New York State Board of Elections petitions this Court of a writ of certiorari to the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at *Lerman v. Board of Elections*, 232 F.3d 135 (2000) and is reproduced in the Appendix at pages 1a-34a. The decision of the district court is not reported and is reproduced in the Appendix at pages 35a-54a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on November 9, 2000. That court denied a timely petition for rehearing on December 13, 2000. (Appendix E). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case questions the validity of Section 6-132 of the New York State Election Law under the First and Fourteenth Amendments to the United States Constitution.

The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.

U.S. Constitution, Amendment 1.

The Fourteenth Amendment provides, in relevant part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive an person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Constitution, Amendment 14, Section 1.

Section 6-132 of the New York State Election Law provides, in relevant part:

> 2. There shall be appended at the bottom of each sheet a signed statement of a witness who is a duly qualified voter of the state and an enrolled voter of the same political party as the voters qualified to sign the petition, and who is also a resident of the political subdivision in which the office or position is to be voted for. . . . Such a statement shall be accepted for all purposes as the equivalent of an affidavit, and if it contains a material false statement, shall subject the person signing it to the same penalties as if he had been duly sworn.
>
> 3. In lieu of the signed statement of a witness who is a duly qualified voter of the state qualified to sign the petition, the following statement signed

by a notary public or commissioner of deed shall be accepted; On the dates above indicated before me personally came each of the voters whose signatures appear on this petition sheet containing __ (fill in number) signatures, who signed same in my presence and who, being by me duly sworn, each for himself, said that the forgoing statement made and subscribed by him, was true.

Date: (Signature and official title of officer administering oath)

Section 6-132, New York State Election Law, subdivisions 2 & 3.

STATEMENT OF THE CASE

Election Law § 6-132 requires witnesses to candidate designating petitions for primary elections be enrolled members of the political party as those persons who are qualified to sign the petition, and residents of the political subdivision the candidate seeks to represent. That section also provides an individual who is a notary public or commissioner of deeds may also circulate such petitions; however, they are required to swear each of the signers.

Candidate, John Sollazzo, was seeking the Independence Party nomination for the 50th Council District in N.Y.C. Ms. Lerman, an enrolled member of the Independence Party, who lives in the 49th Council District, circulated Mr. Sollazzo's petition, gathering 58 signatures of the 132 signatures submitted. Mr. Sollazzo's petition was challenged, pursuant to N.Y.S. law, and the N.Y.C. Board of Elections

invalidated all but 12 of the signatures submitted, including the 58 signatures gathered by Ms. Lerman. The signatures gathered by Ms. Lerman were invalidated because she is not a resident of the 50th council district.

Respondents commenced this action, pursuant to 42 U.S.C. § 1983, *pro se*, by Order to Show Cause, in the U.S. District Court for the Eastern District of New York, alleging that the residency requirement of Election Law § 6-132 violates their rights under the First and Fourteenth Amendments of the U.S. Constitution. The district judge granted the motions to dismiss of N.Y.C. Board of Elections and respondents herein appealed.

The Court of Appeals for the Second Circuit reversed the district court decision, finding the residency requirement of Election Law § 6-132 imposed a severe burden on First Amendment rights of political speech and association; that the appropriate standard for review was strict scrutiny; and because the residency requirement of the statute is not narrowly drawn to address a compelling state interest, it is unconstitutional.

REASONS FOR GRANTING THE WRIT

The writ of certiorari should be granted so this Court may decide an issue of great importance to the states: May state statutes require circulators of candidate petitions to be residents of the political subdivision where the petition is being circulated without running afoul of the First and Fourteenth Amendments? Several states, including New York, and the District of Columbia have enacted such statutes.[1] And, as noted in Chief Justice Rehnquist's dissent

1. *See, e.g.*, Cal. Elec. Code § 8106(b)(4); Colo. Rev. Stat. § 1-4-905; Conn. Gen. Stat. § 9-410; D.C. Code § 1-1312; 10 ILCS (Cont'd)

in *Buckley*, 525 U.S. 182 at 232 (1999), the majority decision in *Buckley* raises questions about those statutes.

The validity of those statutes depends upon the level of scrutiny applied. In *Buckley,* this Court applied a strict scrutiny standard, finding that the registration requirement at issue placed a severe burden on core political speech. The Second Circuit applied strict scrutiny standard to the residency requirement of N.Y.'s EL § 6-132, and invalidated the provision. However, the court applied the strict scrutiny standard in error. The residency requirement does not significantly hamper the kind of one-on-one political communications protected by the First Amendment, and incorporated in the Fourteenth Amendment. Therefore, the statute should be scrutinized only for its reasonableness, and upheld under that standard.

New York's residency requirement does not place a severe burden on First and Fourteenth Amendment rights and therefore should not be subject to strict scrutiny.

The Second Circuit, in determining that the residency requirement imposes a severe burden on protected political speech, relies upon *Buckley v. American Constitutional Law Foundation, Inc.*, 119 S. Ct. 636, where the Court held the registration requirement at issue there, imposed a severe burden on political speech by "drastically reduc[ing] the number of persons . . . available to circulate petitions." *Buckley* at 643; and *Molinair v. Powers*, 82 F. Supp.2d 57

(Cont'd)
5/7-10; Kan. Stat. § 25-205; Mich. Stat. Ann. § 544(3); Neb. Rev. Stat. § 32-629; Ohio Rev. Code § 3503.06; 25 Pa. Cons. Stats. § 2869; RI Gen. Laws § 17-23-12; VA Code § 24.2-521; 18 VI Code Ann. § 346(1); Wis. Stat. § 8.40(2).

(E.D.N.Y. 2000), in which the District Court held Section 6-132(2) of N.Y.'s election law, unconstitutional in the context of the presidential primary of the Republican Party.

This Court has frowned upon the use of litmus tests in lieu of the balancing of rights and issues and the hard judgments that are required to determine whether specific restrictions on the election process pass constitutional muster. *See Buckley*, at page 192; and *Storer v. Brown*, 415 U.S. 724 (1974) at page 730. In *Molinari*, the court balanced all the rights at issue, and in a decision that was heavily supported by the specific factual circumstance, held Election Law § 6-132(2) to be unconstitutional in the context of the 2000 Presidential Primary of the Republican Party.

Examining the residency requirement, standing alone, there may well be good reason to conclude that the provision does not pass constitutional muster. However, the residency requirement does not stand alone in the statutory scheme for ballot access. Indeed, it is one of two alternatives available for petition circulators. The other alternative for witnessing or circulating candidate petitions is for the witness to be a notary public or commissioner of deeds; *see* EL § 6-132(3). There are no registration, enrollment or residency requirements attached to this alternative. Indeed, rather than reducing the pool of petition circulators, the N.Y.S. statute provides for a larger pool, encompassing individuals outside of the political subdivision in which a candidate is seeking office.

Every statute and regulation imposes a burden on protected rights. Such impositions are necessary to the orderly conduct of elections. The requirements of § 6-132 seek to ensure that the residents of the political subdivision have

the greatest possible involvement at every level in the process of choosing their representatives, and that candidates exhibit a modicum of support. The requirements are drawn to meet the state's interest in assuring the integrity of the process by having some measure of control over the petition witnesses. Such control, as an element assuring the integrity of the electoral process has long been recognized as a legitimate state interest. *Jenness v. Fortson*, 403 U.S. 431 (1971). It is not unreasonable for the state, in meeting this interest, to require petition witnesses to either reside in the district, or be notaries or commissioners of deeds. Each of these options gives the state the necessary control it needs to subject petition witnesses to the jurisdiction of the state's courts.

The Second Circuit found that the residency requirement imposed a severe burden on protected speech because it drastically reduced the pool of circulators available. However, when taken in consideration with the unfettered provision allowing notaries and commissioners of deeds to circulate petitions, the pool of potential circulators is not decreased, but dramatically increased in a way that benefits both the potential candidates and the state. Ms. Lerman was not prohibited in any way from expressing her support of Mr. Sollazzo's candidacy. Nor, [as was learned after the Second Circuit rendered its opinion], was she prevented from witnessing a petition for Mr. Sollazzo, as she is indeed a notary public and could have carried as such.

The interest being served is a legitimate state interest in assuring the integrity of the electoral process and the fullest possible participation in that process by those most directly affected by a candidacy. The burdens imposed by § 6-132 to meet that interest are not severe. Therefore, under the test established in *Burdick v. Takushi*, 504 U.S. 428 (1992) at 434, the appropriate test is not strict scrutiny but

reasonableness. *See also Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997). Under the reasonableness standard of *Burdick*, the residency requirement for EL § 6-132 passes constitutional muster.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED, DECIDED AND FILED NOVEMBER 9, 2000

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1999

(Argued: March 24, 2000 Decided: NOV -9 2000)

Docket No. 99-9015

ANITA LERMAN and ANGELO D'ANGELO,

Plaintiffs-Appellants,

— v. —

BOARD OF ELECTIONS IN THE CITY OF NEW YORK; BOARD OF ELECTIONS OF THE STATE OF NEW YORK; and GEORGE E. PATAKI, GOVERNOR,

Defendants-Appellees.

Before:

FEINBERG, JACOBS, AND STRAUB, *Circuit Judges*.

* * *

Appendix A

SJTRAUB, *Circuit Judge*:

The late former Speaker of the United States House of Representatives, Thomas P. "Tip" O'Neill, was fond of saying that "all politics is local." TIP O'NEILL, ALL POLITICS IS LOCAL (1994). Through its requirement that witnesses to ballot access "designating petitions" be "resident[s] of the political subdivision in which the office or position is to be voted for," N.Y. ELEC. L. § 6-132(2) (McKinney 1998), the State of New York has attempted to elevate this political adage into an affirmative command. The Constitution, however, protects certain forms of political activity from government interference even if they transcend local political boundaries. While the state does have legitimate interests that justify regulating the electoral process — especially when it seeks to protect the integrity of that process — it cannot mandate that *all* political activity be "local" without demonstrating the required fit between its chosen means of regulation and those legitimate ends.

We conclude that the section 6-132(2) witness residence requirement severely burdens interactive political speech and association rights protected by the First Amendment (as incorporated by the Fourteenth Amendment) without advancing *any* legitimate or important state interest. Accordingly, we hold this particular statutory requirement unconstitutional on its face.

BACKGROUND

John Sollazo, a registered member of the Independence Party of New York, sought to compete in the primary election

held September 14, 1999, in order to gain the nomination of the Independence Party for the New York City Council seat representing the 50th Council District in Staten Island. In order for a City Council candidate's name to appear on the primary election ballot, New York law requires that candidate to file a "designating petition" containing valid signatures from at least five percent of the registered party members within the district from which the candidate seeks election.[1] *See* N.Y. ELEC. L. §§ 6-118, 6-136(2) (McKinney 1998). In Sollazo's case, therefore, it was necessary for him to obtain 38 valid petition signatures, representing five percent of the 760 registered Independence Party members in the 50th District. Plaintiff Anita Lerman, a resident of the 49th Council District, served as a witness to the signatures on Sollazo's petition, witnessing a total of 58 signatures including those of Plaintiffs Angelo D'Angelo and Pio D'Agostino,[2] both of whom are residents of the 50th District. Lerman, however, lives outside the 50th District. Accordingly, defendant Board of Elections in the City of New York ("NYC Board") ruled, on August 3, 1999, that these 58 signatures were invalid, since New York law requires that designating petition signatures be witnessed by either a notary public, a commissioner of deeds, or an individual who not only is "duly qualified" to vote in New York and an "enrolled voter of the same political party" as

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1. Notwithstanding this five percent threshold, the statute also provides that for any office that is "to be filled in the city of New York by all the voters of any city council district," the candidate's designating petition need not contain more than nine hundred signatures. N.Y. ELEC. L. § 6-136(2)(c-1) (McKinney 1998).

2. D'Agostino is not a party to this appeal.

the petition signers, but also is a "resident of the political subdivision in which the office or position is to be voted for." N.Y. ELEC. L. § 6-132(2)-(3) (McKinney 1998). Lerman did not circulate Sollazo's designating petition as a notary public or commissioner of deeds.

The plaintiffs filed a complaint *pro se* against the NYC Board, the New York State Board of Elections ("NYS Board"), and Governor George Pataki in August 1999, seeking declaratory and injunctive relief on the grounds that the witness residence requirement in section 6-132(2) violates the First and Fourteenth Amendments on its face by permitting only district residents to be eligible to witness signatures on the candidate's designating petition. The NYC Board moved for dismissal pursuant to Fed. R. Civ. P. 12(b)(6), and after oral argument on August 31, 1999, the District Court (Frederic Block, *Judge*) delivered an opinion from the bench dismissing Plaintiffs' complaint in its entirety. Judgment was entered on September 3, 1999. Plaintiffs moved this Court for an expedited appeal on the grounds that the primary election was to be held on September 14, 1999; that motion was denied. The primary election took place as scheduled without Sollazo's name on the ballot.

DISCUSSION

We review the District Court's dismissal of the plaintiffs' complaint *de novo*. *See Posr v. Court Officer Shield No. 207*, 180 F.3d 409 (2d Cir. 1999). Since most *pro se* plaintiffs lack familiarity with the formalities of pleading requirements, we must construe *pro se* complaints liberally, applying

a more flexible standard to evaluate their sufficiency than we would when reviewing a complaint submitted by counsel.[3] *See, e.g., Hughes v. Rowe*, 449 U.S. 5, 9-10 (1980) (per curiam); *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (per curiam). In order to justify the dismissal of the plaintiffs' *pro se* complaint, it must be " 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " *Haines*, 404 U.S. at 521 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

I. Preclusive Effect of *Molinari v. Powers*

In another, widely noted New York ballot access case that was litigated in the Eastern District of New York after briefing in this appeal had been completed, but before oral argument, the NYS and NYC Boards entered into a stipulation providing that several provisions of the New York Election Law "impose[d] an undue burden on access to the ballot in connection with the 2000 New York State Republican Presidential Primary." *Molinari v. Powers*, No. 99 Civ. 8447, Stipulation at 2 (E.D.N.Y. Feb. 4, 2000). The parties in that case also agreed to waive their rights to appeal from any order entered by the district court based on that stipulation, *see id.*, and upon acceptance by the district court, the stipulation served as the predicate for that court's order of preliminary injunctive relief. *See Molinari v. Powers*, 82 F. Supp. 2d 57, 68-69 (E.D.N.Y. 2000) (Korman, C.J.).

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3. While counsel now has appeared on behalf of each of the plaintiffs in this appeal, the plaintiffs' complaint initially was filed in the District Court *pro se*. We therefore evaluate the sufficiency of the complaint using the less stringent standard applicable to *pro se* plaintiffs. *See Elliott v. Bronson*, 872 F.2d 20 (2d Cir. 1989).

Appendix A

The district court in *Molinari* accepted the parties' stipulation "only after independently concluding that the scheme, both in its totality and by virtue of two of its individual but related elements," including the section 6-132(2) witness residence requirement, "places an undue burden on the right to vote under the First Amendment." *Id.* at 69.

After counsel appeared for the *pro se* plaintiffs and oral argument was held in this appeal on March 24, 2000, we ordered the parties to submit supplemental briefs addressing all of the issues presented on appeal, including the preclusive effect, if any, of the stipulation and order entered in *Molinari*. *See Lerman v. Board of Elections*, No. 99-9015, Order at 1-2 (2d Cir. Mar. 30, 2000). In their supplemental brief, the plaintiffs argue that the defendants in this case[4] are indeed precluded from defending the constitutionality of the section 6-132(2) witness residence requirement by virtue of the *Molinari* stipulation and order. The plaintiffs suggest that

> the defendants' behavior looks disquietingly like an attempt to have the best of both worlds — to abandon their defense of § 6-137 in a politically sensitive, vigorously contested case that was closely followed in the press, but avoid the usual precedential effects of doing so by pursuing their

4. While Governor Pataki was not a party in *Molinari*, the plaintiffs maintain that his absence from that case has no bearing upon whether issue preclusion applies here, since the NYS and NYC Boards, which were parties in *Molinari*, are responsible for enforcement of New York election laws. *See* N.Y. ELEC. L. § 3-104 (McKinney 1998).

> defense of § 6-132 in what was a *pro se*, low profile, appeal.[5]

Supp. Brief of Plaintiffs-Appellants at 11. To allow the defendants to relitigate the constitutionality of the section 6-132(2) witness residence requirement, the plaintiffs maintain, would "give[ ] the lawsuit 'the aura of the gaming table.' " *Id.* (quoting *Blonder-Tongue Labs., Inc. v. University of Illinois Found.*, 402 U.S. 313, 338 (1971)). The defendants respond that *Molinari* has no preclusive effect in this case, since *Molinari* did not decide the precise issue that we confront in this case and the conclusion made by Chief Judge Korman in *Molinari* concerning the constitutionality of the section 6-132(2) witness residence requirement went beyond what was necessary to grant the *Molinari* plaintiffs the relief they requested.

We are not untroubled by the possibility that the defendants have attempted to evade their stipulation in *Molinari* that the section 6-132(2) witness residence requirement imposes an "undue burden" on political speech and their waiver of the right to argue otherwise on appeal in that case. However, the preclusion issue is close — and since the merits of this case are not, we dispose of this case on the

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5. Section 6-137 of the New York Election Law sets forth the framework governing the selection of delegates and alternate delegates in the Democratic and Republican Parties' presidential primary elections for the year 2000. N.Y. ELEC. L. § 6-137 (McKinney Supp. 2000); *see also Molinari v. Powers*, 82 F. Supp. 2d 57, 59-60 (E.D.N.Y. 2000). The witness residence requirement in section 6-132(2) applies to designating petitions filed under section 6-137 on behalf of presidential candidates.

merits without reaching any conclusion as to the preclusive effect of *Molinari*.

II. Mootness

The NYC Board argues that the plaintiffs' claims are moot, since the September 1999 primary election is over, having taken place without John Sollazo's name on the ballot. However, this contention is mistaken since the plaintiffs' claims fall within the exception to the mootness doctrine for issues "capable of repetition, yet evading review." *Meyer v. Grant*, 486 U.S. 414, 417-18 n.2 (1988) (challenge to ballot access provisions for ballot propositions is controversy capable of repetition, yet evading review); *see Members for a Better Union v. Bevona*, 152 F.3d 58, 61-62 (2d Cir. 1998). Both of the two preconditions for invoking this doctrine have been met — the challenged action was too short to be fully litigated prior to its expiration, and there is a reasonable expectation that the same complaining parties would be subject to that same action in the future. *See Grant*, 486 U.S. at 417-18 n.2; *Krislov v. Rednour*, 226 F.3d 851, 858 (7th Cir. 2000). Since the issues presented in this case "will persist in future elections, and within a time frame too short to allow resolution through litigation," *Fulani v. League of Women Voters Educ. Fund*, 882 F.2d 621, 628 (2d Cir. 1989), the NYC Board's mootness argument necessarily fails.

III. Standing

The NYC Board also contends that as a resident of the 49th Council District, Lerman lacks standing under Article III to bring this action because she is "unaffected by the

outcome" of the election in the 50th Council District and therefore suffers no injury from the absence of Sollazo from the primary ballot in that district. The District Court expressly declined to address the question, but indicated offhand that it, too, did not think Lerman had standing under Article III.[6] The District Court also concluded that plaintiffs lacked prudential standing to challenge the section 6-132(2) witness residence requirement on its face, rather than only as applied to them. Both of these contentions are mistaken.

First, it is clear that Lerman has standing under Article III to assert her own claims under the First Amendment.[7] In order to have standing under Article III, Lerman must

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6. While opining that Lerman's standing was "very questionable," the District Court elected not to address the Article III standing question, asserting that "in light of my decision, the standing issue is not terribly compelling here, because I'm deciding the case on the merits, in any event." *Lerman v. Board of Elections*, No. CV-99-4901, transcript at 19 (E.D.N.Y. Aug. 31, 1999). However, such an assertion of "hypothetical jurisdiction" — assuming that Article III jurisdiction exists for the purpose of deciding the merits — has been rejected by the Supreme Court. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93-94 (1998); *id.* at 101 ("Hypothetical jurisdiction produces nothing more than a hypothetical judgment — which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning."). Thus, because the District Court had doubts about Lerman's standing under Article III to pursue this action, it should have addressed this threshold question directly before proceeding to address the merits. *See id.* at 93-102.

7. At no point has it been suggested that D'Angelo and D'Agostino, who were signatories to candidate Sollazo's designating petition, lack standing under Article III.

demonstrate that (1) she has suffered an "injury in fact" that is "concrete and particularized" as well as "actual or imminent," rather than "conjectural or hypothetical"; (2) the injury is "fairly traceable" to the challenged conduct; and (3) it is likely, rather than "merely speculative," that the injury will be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal quotation marks omitted). The determination of whether Article III standing exists also must comport with the "manner and degree of evidence required at the successive stages of the litigation." *Id.* at 561. Since this case remains at the pleading stage, all facts averred by the plaintiffs must be taken as true for purposes of the standing inquiry — as they must be for any other issue presented. "[G]eneral factual allegations of injury resulting from [the challenged statute and conduct] may suffice [to support the existence of standing], for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim."[8] *Id.* (internal quotation marks and citation omitted).

Lerman appears rather easily to have met the three requirements set forth by *Defenders of Wildlife*. Having

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8. We also note that the obligation to "read the pleadings of a *pro se* plaintiff liberally and interpret them 'to raise the strongest arguments that they suggest,' " *McPherson v. Coombe*, 174 F.3d 276, 280 (2d Cir. 1999), extends to the question of standing no less than it does to any other issue. *See Platsky v. C.I.A.*, 953 F.2d 26, 28-29 (2d Cir. 1991) (per curiam) (reversing district court for dismissing *pro se* complaint for lack of standing without explaining formalities of pleading and affording *pro se* plaintiff an opportunity to replead).

associated with Sollazo in order to promote his political candidacy and help him gain access to the primary election ballot, Lerman asserts injury in having been deprived of the opportunity to gather signatures in behalf of his candidacy. *Cf. Coalition for Sensible & Humane Solutions v. Wamser*, 771 F.2d 395, 399 (8th Cir. 1985) (refusal by election officials to appoint individual members of association as voter registrars caused injury-in-fact sufficient to confer standing, by preventing those individuals from registering new voters). Moreover, the NYC Board has acted directly to strike those designating petitions witnessed by Lerman, and in the context of an action "challenging the legality of government action," we must draw some significance from the fact that Lerman is a *direct* "object of the action . . . at issue." *Defenders of Wildlife*, 504 U.S. at 561. Given the nature of the defendants' challenged conduct, there should be "little question that the [defendants'] action . . . has caused [her] injury, and that a judgment preventing . . . the action will redress it." *Id.* at 561-62 (distinguishing such challenges from challenges in which the "asserted injury arises from the government's allegedly unlawful regulation . . . of someone else," a situation in which "much more is needed" to aver standing).

The NYC Board rests its challenge to Lerman's standing primarily on the argument that because she does not live in the 50th District, she is "unaffected by the outcome of an election for a council seat" within that district and therefore suffered no injury from Sollazo's exclusion from the primary election ballot. However, the NYC Board's suggestion that any cognizable "injury-in-fact" stops at the electoral district's edge misunderstands the nature of the plaintiffs' challenge

to section 6-132(2). The cases cited by the NYC Board in support of its argument make that misunderstanding apparent.[9] For example, the NYC Board analogizes this case to *United States v. Hays*, 515 U.S. 737 (1995), which held that individuals living outside a "racially gerrymandered" electoral district lack standing to challenge its apportionment as violating the Equal Protection Clause of the Fourteenth Amendment. In the context of so-called "racial gerrymandering," however, the injury-in-fact is caused by the "special representational harms" that result from being identified and placed in a particular electoral district based on one's race — the underlying source of the injury is the racial classification, not the apportionment as such. *Id.* at 745; *see also id.* at 739 (individuals have standing to challenge "racial gerrymandering" if they are district residents *or* if they "demonstrate[ ] that they, personally, have been subjected to a racial classification"). Here, Lerman does not assert a *representational* injury of the sort considered in *Hays*. Rather, it is section 6-132(2)'s geographic restriction *itself* that is alleged to cause the injury-in-fact to Lerman's rights to engage in interactive political speech and expressive

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9. The NYC Board's argument also misunderstands the nature of the Article III standing inquiry itself, for it appears to conflate the threshold question of Lerman's standing under Article III — *i.e.*, whether she has alleged an "injury-in-fact" that is fairly traceable to the challenged conduct and redressable by a favorable judicial decision — with the question of whether Lerman has a valid claim on the merits. The two questions, however, are distinct. *See Coalition for Sensible & Humane Solutions*, 771 F.2d 395, 399-400 (8th Cir. 1985) (holding that unregistered voter and individuals denied status as registrars have standing to challenge registrar appointment process, but denying their claim on the merits).

political association across electoral district boundaries. Indeed, from Lerman's perspective, it is the very fact that these speech and associational interests have nothing to do with district boundaries that renders the witness residence requirement problematic. The injury-in-fact she alleges concerns the very process of engaging in political activity in support of Sollazo's candidacy, and that injury is sufficient to confer standing under Article III.

Second, in addition to their standing to challenge the section 6-132(2) witness residence requirement as applied to their own speech and associational activity, the plaintiffs also have third party (or *jus tertii*) standing to challenge the witness residence requirement on its face. The question of standing encompasses both constitutional and prudential considerations. *See Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 955 (1984) ("In addition to the limitations on standing imposed by Art. III's case-or-controversy requirement, there are prudential considerations that limit the challenges courts are willing to hear."); *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 471 (1982) ("The term 'standing' subsumes a blend of constitutional requirements and prudential considerations . . . ."); *Singleton v. Wulff*, 428 U.S. 106, 112 (1976) (constitutional requirements under Article III and prudential requirement that plaintiffs be the "proper proponents of the particular legal rights on which they base their suits" are distinct aspects of standing inquiry). The issue of whether a facial challenge may be entertained is one such prudential consideration, "a species of third party (*jus tertii*) standing" by which "a party seeks to vindicate not only his own rights, but those of others who may also be

adversely impacted by the statute in question." *City of Chicago v. Morales*, 527 U.S. 41, 55-56 n.22 (1999) (plurality opinion); *see also Joseph H. Munson Co.*, 467 U.S. at 956-58 (permitting facial challenge under First Amendment overbreadth doctrine as exception to prudential limitations against third party standing); *Broadrick v. Oklahoma*, 413 U.S. 601, 611-613 (1973) (same).

The District Court concluded that the plaintiffs lacked standing to raise a facial challenge to the section 6-132(2) witness residence requirement, asserting that in order for that challenge to go forward, the plaintiffs needed to "establish that no set of circumstances exists under which the act would be valid." *Lerman v. Board of Elections*, No. CV-99-4901, transcript at 7 (E.D.N.Y. Aug. 31, 1999) (citing *City of New York v. United States*, 179 F.3d 29, 33 (2d Cir. 1999), *cert. denied*, 120 S. Ct. 932 (2000)). The standard relied upon by the District Court derives from the Supreme Court's statement in *United States v. Salerno*, 481 U.S. 739, 745 (1987). *Salerno*, however, does not apply to this case, in which the plaintiffs assert the violation of rights protected by the First Amendment.[10] Rather, since the plaintiffs

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10. It is not even clear that *Salerno*'s "no set of circumstances" test articulates an exclusive standard for making facial challenges outside the First Amendment context, as a plurality of the Supreme Court recently has noted:

> To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself

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challenge a statute regulating the ability to engage in interactive political speech and associational activity, their standing to challenge the statute on its face is governed by the overbreadth doctrine. *See Joseph H. Munson Co.*, 467 U.S. at 956-57. Under the overbreadth doctrine, the plaintiffs need only "demonstrate a substantial risk that application of the provision will lead to the suppression of speech." *National Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998); *see also Broadrick*, 413 U.S. at 612-615 (holding that statutes inhibiting the exercise of First Amendment rights may be invalidated on their face if the impermissible applications of the law are substantial when "judged in relation to the statute's plainly legitimate sweep"). *Cf. Salerno*, 481 U.S. at 745 (noting applicability of overbreadth doctrine to First Amendment claims). When a

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> (even though the defendants in that case did not claim that the statute was unconstitutional as applied to them, . . . the Court nevertheless entertained their facial challenge).

City of Chicago v. Morales, 527 U.S. 41, 55-56 n.22 (1999) (plurality opinion) (citation omitted); *see also Janklow v. Planned Parenthood*, 517 U.S. 1174, 1175-76 (1996) (memorandum of Stevens, J., respecting the denial of the petition for certiorari) (questioning applicability of *Salerno* standard); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 895 (1992) (declining to apply *Salerno*, and holding instead that abortion law is facially unconstitutional if "in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion"); Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235 (1994).

litigant challenges a statute on its face as overly broad, the prudential limitations against third party standing are relaxed, and the litigant may assert the rights of individuals whose interests might be affected by the statute but who are not before the court.[11] *See Joseph H. Munson Co.*, 467 U.S. at 956-57; *Broadrick*, 413 U.S. at 612.

The plaintiffs clearly have standing under both Article III and the overbreadth doctrine to challenge the section 6-132(2) witness residence requirement, both as applied to them and on its face. We therefore proceed to address the merits of the plaintiffs' claims.

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11. In this context, the NYC Board's argument that the plaintiffs do not have third party standing to assert Sollazo's rights as a candidate for office is misplaced. To be sure, were we solely to consider the prudential limitations against third party standing in isolation, we might well conclude that the plaintiffs lack third party standing to assert Sollazo's claims, since there is no indication that Sollazo faces any hindrance to the assertion of his own rights. *See Campbell v. Louisiana*, 523 U.S. 392, 397 (1998); *Singleton v. Wulff*, 428 U.S. 106, 115-16 (1976). However, since this case arises under the First Amendment, and the plaintiffs challenge the statute on its face, we do not consider those limitations against third party standing in isolation. The plaintiffs therefore have third party standing to assert Sollazo's rights, but only, of course, insofar as they have standing under the overbreadth doctrine to assert the rights of *any* third party whose interests might be affected by the statute, but who are not before the court. *See Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956-57 (1984); *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

IV. Constitutionality of the Section 6-132(2) Witness Residence Requirement

The district court in *Molinari* concluded that the section 6-132(2) witness residence requirement is unconstitutional on its face, violating the First Amendment (as incorporated by the Fourteenth Amendment) by infringing upon the plaintiffs' political speech and associational rights and their right to equal protection. *See Molinari v. Powers*, 82 F. Supp. 2d 57, 73-77 (E.D.N.Y. 2000). We agree substantially with Chief Judge Korman's decision in *Molinari*, and hold that the witness residence requirement in section 6-132(2) is unconstitutional on its face. *See id.*; *accord Buckley v. American Constitutional Law Found.*, 119 S. Ct. 636, 661 & n.1 (1999) (Rehnquist, C.J., dissenting) (stating that the Court's decision "invalidates a number of state laws" and that section 6-132, among other state laws, is now in "serious constitutional jeopardy"); *Rockefeller v. Powers*, 917 F. Supp. 155, 161 (E.D.N.Y. 1996) (Korman, C.J.) (witness residence requirement in section 6-132(2) "performs [no] essential function"), *aff'd*, 78 F.3d 44, 46 (2d Cir. 1996).

A. *The Burden on First Amendment Rights and Degree of Scrutiny to Be Applied*

In determining the level of scrutiny to be applied to the section 6-132(2) witness residence requirement, we first must assess the extent to which that requirement burdens First and Fourteenth Amendment rights. *See Buckley v. American Constitutional Law Found., Inc.*, 119 S. Ct. 636, 642 (1999); *id.* at 649 (Thomas, J., concurring); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). When state election laws subject

speech, association, or the right to vote to " 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.' " *Burdick*, 504 U.S. at 434 (citation omitted); *see also Prestia v. O'Connor*, 178 F.3d 86, 88 (2d Cir. 1999), *cert. denied*, 120 S. Ct. 539 (1999); *Schulz v. Williams*, 44 F.3d 48, 56 (2d Cir. 1994). By contrast, when a state election law "imposes only reasonable, nondiscriminatory restrictions" upon First and Fourteenth Amendment rights, then "the State's important regulatory interests are generally sufficient to justify the restrictions." *Burdick*, 504 U.S. at 434 (internal quotation marks omitted); *see also Prestia*, 178 F.3d at 88. The burden imposed by the challenged regulation is not evaluated in isolation, but within the context of the state's overall scheme of election regulations. *See Prestia*, 178 F.3d at 88.

Ordinarily, policing this distinction between legitimate ballot access regulations and improper restrictions on interactive political speech does not lend itself to a bright line or "litmus-paper test," *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *see also American Constitutional Law Found.*, 119 S. Ct. at 642, but instead requires a particularized assessment of the nature of the restriction and the degree to which it burdens those who challenge it. *See Burdick*, 504 U.S. at 434; *Schulz*, 44 F.3d at 56. However, in those cases in which the regulation clearly and directly restricts "core political speech," as opposed to the " 'mechanics of the electoral process,' " it may make "little difference whether we determine burden first," since "restrictions on core political speech so plainly impose a 'severe burden' " that application of strict scrutiny clearly will be necessary.

American Constitutional Law Found., 119 S. Ct. at 650 (Thomas, J., concurring) (internal citations omitted); *see id.* at 642 n.12 (opinion of the court); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 345 (1995) (declining to apply severe/lesser burdens balancing test to direct regulation of "pure speech").

The petition circulation activity at issue in this case, while part of the ballot access process, clearly constituted core political speech subject to exacting scrutiny. *See American Constitutional Law Found.*, 119 S. Ct. at 651 (Thomas, J., concurring) (applying strict scrutiny to voter registration requirement for initiative petition circulators); *Meyer v. Grant*, 486 U.S. 414, 421-22 (1988) ("[T]he circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.' "); *Krislov v. Rednour*, 226 F.3d 851, 866 (7th Cir. 2000) (stating that "circulating nominating petitions [for political candidates] necessarily entails political speech"). As the Supreme Court held in Grant, petition circulation "of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change." 486 U.S. at 421.

It should be clear, however, that even if one characterizes this restriction on petition circulation as being more directly concerned with the "mechanics of the electoral process" than with speech, requiring us to evaluate the severity of the burdens on political speech and association posed by that regulation before determining the level of scrutiny to be applied, the witness residence requirement severely burdens

political speech by "drastically reduc[ing] the number of persons . . . available to circulate petitions." *American Constitutional Law Found.*, 119 S. Ct. at 643; *see id.* at 651 (Thomas, J., concurring) (restriction on petition circulation severely burdens speech if it "reduces the voices available to convey political messages"); *Grant*, 486 U.S. at 422-23 (prohibition on paid petition circulators restricts political speech by "limit[ing] the number of voices who will convey appellees' message and . . . mak[ing] it less likely that appellees will garner the number of signatures necessary" to gain access to ballot, thereby limiting their ability to influence public political discussion); *Krislov*, 226 F.3d at 860 (statute limiting petition circulators to residents of the political subdivision for which the office is to be voted substantially burdens political speech by "preclud[ing] the candidate from utilizing a large class of potential solicitors to convey his message"); *Molinari*, 82 F. Supp. 2d at 76 (witness residence requirement in section 6-132(2) substantially burdens political speech because it reduces the number of individuals available to circulate designating petitions and, therefore, "reduces the chances that those supporting the candidates will gather signatures sufficient to qualify for the ballot"). Moreover, petition circulation bears an intimate relationship to the right to political or expressive association. The right to political association also "is at the core of the First Amendment, and even practices that only potentially threaten political association are highly suspect." *Krislov*, 226 F.3d at 860 (quoting *McCloud v. Testa*, 97 F.3d 1536, 1552 (6th Cir. 1996)) (internal quotation marks omitted). Obviously, the section 6-132(2) witness residence requirement does not ban association between candidates and non-residents of the electoral district altogether — but the

statute need not go that far in order to substantially burden the right to political association. "[B]y preventing the candidates from using signatures gathered by [non-resident] circulators . . . , the law inhibits the expressive utility of associating with these individuals because these potential circulators cannot invite voters to sign the candidates' petitions in an effort to gain ballot access." *Krislov*, 226 F.3d at 861.

Sollazo's particular case highlights the burdens on political speech and association imposed by the section 6-132(2) witness residence requirement. First, there should be little doubt that the witness residence requirement dramatically reduced the number of potential petition circulators available to advance Sollazo's political message. As counsel for Lerman noted at oral argument, there are approximately 170,000 registered members of the Independence Party statewide, but only 760 in the 50th District. The witness residence requirement therefore renders almost 99.5 percent of all Independence Party members ineligible to circulate petitions within the 50th District. The fact that many of these statewide party members might not have had any interest in circulating petitions on behalf of Sollazo has no bearing upon the burden that the residence requirement imposes upon interactive political speech. Even if, as a practical matter, the requirement only prevented Sollazo from using a handful of those statewide party members, "for some minor candidates" — especially for a minor party candidate, such as Sollazo, running in a political subdivision as small as the 50th District — "parting with one or two avid circulators could significantly impact their campaigns," *Krislov*, 226 F.3d at 862.

Second, while Sollazo formally needed only 38 signatures to qualify for the ballot, as a practical matter a candidate seeking election "needs a surplus of signatures, because they will likely be challenged on any number of grounds, resulting in some, perhaps many, invalidations."[12] *Krislov*, 226 F.3d at 859-60; *Molinari*, 82 F. Supp. 2d at 75 (noting that the "facially low percentage of signatures" required in each district does not mitigate the witness residence requirement's burden on speech since the "burdens New York places on the petitioning process make it far more difficult to obtain the requisite signatures"). For minor political candidates such as Sollazo, that burden can be particularly severe. While candidates who are well-financed or favored by their party's leadership might have ready access to the resources necessary to ensure that they qualify to appear on the ballot, many candidates — especially those challenging their party's leadership — do not. *Cf.* NEW YORK STATE COMM'N ON GOV'T INTEGRITY, ACCESS TO THE BALLOT IN PRIMARY ELECTIONS: THE NEED FOR FUNDAMENTAL REFORM 10-11 (1988) (noting high costs of New York ballot access process and accompanying litigation to candidates, especially those who are not supported by party organizations). Furthermore, since voters may not sign designating petitions for "a greater number of candidates for public office or party position than the number of persons to be elected," N.Y. ELEC. L. § 6-134(3) (McKinney 1998), the task for

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12. Indeed, in the context of the Republican presidential primary, the chairman of the New York State Republican Party conceded that a campaign must collect at least *six times* the required number of signatures "to ensure survival against post-petition challenges" that almost invariably result from New York's arcane technical requirements. *Molinari*, 82 F. Supp. 2d at 75.

challengers or other minor candidates becomes that much more formidable. Because of this rule, candidates seeking ballot access necessarily face a "shrinking pool" of potential signatories as the petitioning period progresses, whereby those voters who already have signed the petition of another candidate are no longer available to sign another petition.[13] Under these circumstances, identifying and obtaining even a small number of signatures can be like trying to find the proverbial needle in a haystack — especially for a candidate, like Sollazo, who seeks the nomination of a minor party whose pool of potential petition signatories may already be quite small from the outset of the petitioning period. *See Molinari*, 82 F. Supp. 2d at 67-68 (discussing the shrinking pool problem). Thus, even an election law that requires a candidate to obtain "only a relatively small number of signatures" still can severely burden the right to engage in interactive political speech under the First Amendment "if it also preclude[s] the candidate from utilizing a large class of potential solicitors to convey his message, or if it substantially restrict[s] the candidate's ability to choose the means of conveying his message." *Krislov*, 226 F.3d at 860.

The District Court distinguished *American Constitutional Law Foundation* by positing a distinction between *initiative* petition circulators, whom it considered to be engaged in interactive political speech, and *candidate* petition circulators

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13. Under this requirement, only the first signature given by a voter is considered valid; if the voter subsequently signs the petitions of other candidates, those later signatures are deemed invalid. On the other hand, if both of the voter's signatures bear the same date, then neither signature is considered valid. *See* N.Y. ELEC. L. § 6-134(3) (McKinney 1998).

such as Lerman, whom it considered to be engaged in a "classic ballot access type" of activity. *Lerman v. Board of Elections*, No. CV-99-4901, transcript at 10-11 (E.D.N.Y. Aug. 31, 1999). It ultimately relied upon this distinction to conclude that the section 6-132(2) witness residence requirement poses only a minimal burden on interactive political speech and, therefore, less scrutiny was required when evaluating that requirement than in *American Constitutional Law Foundation*. This distinction, however, is rather strained. There is no basis to conclude that petition circulation on behalf of a candidate involves any less interactive political speech than petition circulation on behalf of a proposed ballot initiative — the nature of the regulated activity is identical in each instance. The District Court's distinction depends almost entirely upon its characterization of candidate petition circulation as being "classic," but the fact that candidate elections have a longer history than ballot initiatives or referenda upon petition does not actually establish anything with respect to the burden placed on "interactive political speech." To be sure, the distinction between candidate and initiative campaigns can be relevant in certain circumstances. For example, the government's interest in preventing corruption or the appearance of corruption is sufficiently important to justify limits on contributions to candidate campaigns, but is not sufficiently important when it comes to regulating contributions to initiative campaigns, since there are no candidates to corrupt in those campaigns. *Compare Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976) (government interest in preventing corruption or the appearance of corruption is "constitutionally sufficient justification" for limits on contributions to candidate campaigns), *with First Nat'l Bank of Boston v. Bellotti*,

435 U.S. 765, 790 (1978) ("The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue." (citations omitted)). By contrast, the strength of the state's interest in preserving the integrity of the ballot access process itself is no greater when petition circulators advocate in behalf of particular candidates than it is when they advocate in behalf of ballot initiatives. The distinction between candidate and initiative elections, therefore, is not salient in this context.

Indeed, if the distinction between candidate and initiative ballot access petition bears any relevance at all, it may well suggest the *opposite* conclusion from that reached by the District Court — namely, that the witness residence requirement places an even greater burden on candidate petition circulators than on initiative petition circulators. *See Krislov*, 226 F.3d at 861-62. Unlike initiative campaigns, which typically concern a single issue, campaigns for political office typically require candidates to advance their positions on a variety of issues. As a result, individuals who circulate petitions on behalf of candidates for office typically "must speak to a broader range of political topics" than those who circulate petitions in support of ballot initiatives, and by limiting the number of individuals available to circulate petitions on behalf of candidates, the section 6-132 witness residence requirement "has the potential to squelch a greater quantity and broader range of political speech than laws which only restrict initiative proponents." *Id.* Since we decline to rely upon this distinction, we disagree with the District Court's conclusion that the witness residence requirement presents only a minimal burden on political speech and association.

B. *Application of Strict Scrutiny to the Section 6-132(2) Witness Residence Requirement*

Since the section 6-132(2) witness residence requirement imposes a severe burden on political speech and association, the requirement must therefore be narrowly tailored to advance a compelling state interest in order to pass constitutional muster. *See California Democratic Party v. Jones*, 120 S. Ct. 2402, 2412 (2000); *Buckley v. American Constitutional Law Found.*, 119 S. Ct. 636, 642 n.12 (1999); *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 225 (1989). As in *Molinari*, the defendants attempt to justify the section 6-132(2) witness residence requirement based on three asserted interests: (1) ensuring integrity and preventing fraud in the electoral process; (2) ensuring that candidates demonstrate "a sufficient modicum of support" before their name is included on the ballot; and (3) ensuring that non-residents may not "impose [ ] the cost of a primary on the district." *Molinari v. Powers*, 82 F. Supp. 2d 57, 73-74 (E.D.N.Y. 2000) (internal quotation marks omitted). Again, we agree with Chief Judge Korman's decision in *Molinari* and conclude that the witness residence requirement does not bear even a *rational* relationship to any of these three justifications, let alone the narrowly tailored relationship that strict scrutiny demands.

As a general matter, the first interest asserted by the defendants — ensuring integrity and preventing fraud in the electoral process — is unquestionably compelling. *See Krislov v. Rednour*, 226 F.3d 851, 859 (7th Cir. 2000) ("Because elections must be regulated to remain free from fraud and coercion, some latitude is given to regulations

designed to serve these purposes."); *Schulz v. Williams*, 44 F.3d 48, 57 (2d Cir. 1994) (noting that states are "entitled to take steps to ensure that elections are 'fair and honest' "). And were the defendants able to establish that the use of non-resident petition circulators did, in fact, pose a demonstrable threat to the integrity of the signature collection process, we would be obliged to give greater weight to their argument. However, the fact that the defendants asserted interests are "important in the abstract" does not necessarily mean that its chosen means of regulation "will in fact advance those interests." *Turner Broadcasting Sys., Inc. v. F.C.C.*, 512 U.S. 622, 664 (1994). And in general, the potential dangers to the integrity of the electoral process are more remote during the signature collection process than at the actual time of balloting on election day. *See American Constitutional Law Found.*, 119 S. Ct. at 648; *Grant*, 486 U.S. at 427; *(WIN) Washington Initiatives Now v. Rippie*, 213 F.3d 1132, 1139 (9th Cir. 2000); *Krislov*, 226 F.3d at 865. Accordingly, we cannot uphold a statutory provision that substantially burdens political speech and association at the petition stage of the electoral process without insisting that the defendants "do more than simply 'posit the existence of the disease sought to be cured.' " *Turner Broadcasting Sys.*, 512 U.S. at 664; *see Krislov*, 226 F.3d at 865.

The defendants have failed to suggest *any* meaningful relationship between the section 6-132(2) witness residence requirement and their interest in protecting the integrity of the signature collection process. With respect to that interest, the "usual justification" for a residence requirement is to ensure that the petition witness be answerable to a subpoena. *Molinari*, 82 F. Supp. 2d at 73; *see also American*

Constitutional Law Found., 119 S. Ct. at 644. The witness residence requirement in section 6-132(2), however, does nothing to advance that end. Since the local Boards of Elections in New York have statewide subpoena power, *see* N.Y. ELEC. L. § 3-218(1) (McKinney 1998), the state's purpose is already served by the less burdensome requirements in section 6-132(2) that a petition witness (1) live anywhere within the State of New York, and (2) provide their residence address in an affidavit filed together with the petitions.[14] *See* N.Y. ELEC. L. § 6-132(2) (McKinney 1998); *Molinari*, 82 F. Supp. 2d at 73; *see also American Constitutional Law Found.*, 119 S. Ct. at 644 (state residence requirement "more precisely achieve[s] the State's subpoena service objective" than voter registration requirement (internal quotation marks omitted)); *Krislov*, 226 F.3d at 865 (state interest in maintaining the integrity of the electoral process "can be achieved just as easily (and probably more effectively) through" the more narrowly tailored process for challenging invalid signatures).

There also is little reason to believe the defendants' assertion that district residents are more likely to have "some

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14. The plaintiffs do not challenge those provisions in section 6-132 that require petition witnesses to be qualified voters in the State of New York and registered members of the party of the candidate for whom they wish to circulate petitions. Since the plaintiffs do not challenge these provisions, we need not resolve their constitutionality. We conclude only that these requirements are more narrowly tailored to the state's interest in ensuring the integrity of the ballot access process than the witness residence requirement. *See American Constitutional Law Found.*, 119 S. Ct. at 644-45.

familiarity with persons who sign petitions" or be more qualified to ensure the integrity of the petition circulation process. In an electoral district consisting of many thousands of voters, the likelihood of district residents having any greater "personal familiarity" than non-residents is rather low. Indeed, New York law no longer even requires, as it once did, that petition witnesses attest to personal knowledge of the identity of designating petition signatories. *See Molinari*, 82 F. Supp. 2d at 73-74 (discussing requirement under predecessor to section 6-132(2) that subscribing witness "know[ ] each of the voters whose names are subscribed" to the candidate's petition (internal quotation marks and citation omitted)). Further casting doubt on the defendants' asserted justification for the witness residence requirement is the fact that verification of petition signatures has become considerably easier than it once was given the use of signature imaging technology. Under this system, the signature of every registered voter in each of New York's sixty-two counties may be verified rather easily against a digitized version of that voter's signature on file with the local boards of elections in each county and the city of New York. *See* NEW YORK STATE BD. OF ELECTIONS, ANNUAL REPORT 14 (1999) (discussing availability of signature imaging technology in every county as of 1999, and its use in helping local boards of elections "to more easily validate a voter's eligibility in each individual election"); *see also Schulz*, 44 F.3d at 59 (suggesting that existence of "statewide computer system . . . capable of checking the registration status" of all New York voters might, once implemented, "change[ ] the calculus" by which ballot access restrictions are to be evaluated); *Molinari*, 82 F. Supp. 2d at 72 (noting that computerization of New York voter registration lists

makes it considerably easier to verify identity of petition witnesses and signatories and, therefore, undermines justification for requirement that a petition witness "separately list the town or city in which he or she resides in addition to his or her residence address."). By the same token, if this rationale is understood to mean that district residents are more likely to be aware of the physical boundaries of that district, so as to avoid soliciting invalid signatures from individuals who are not district residents, then the state's interest reduces to mere paternalism, based on the notion that "the State needs to protect candidates because they aren't savvy enough to find solicitors who can read a street map, and thereby refrain from soliciting signatures outside the relevant district." *Krislov*, 226 F.3d at 864.

Noting the exception to the residence requirement that permits non-resident notaries public or commissioners of deeds to circulate and witness petitions, *see* N.Y. ELEC. L. § 6-132(3) (McKinney 1998), the defendants urge us, in effect, to characterize petition circulators as quasi-public officials. Such a characterization, however, does not accurately reflect the role actually played by petition circulators in the ballot access process. As partisans of the candidates for whom they are circulating petitions, petition circulators — regardless of whether they are district residents — almost certainly are motivated entirely by an interest in seeing their candidate gain access to the ballot, rather than any interest in ensuring integrity in the signature collection process. *See Grant*, 486 U.S. at 426 (rejecting argument that paid petition circulator "is any more likely to accept false signatures than a volunteer who is motivated entirely by an interest in having the proposition placed on the ballot");

Molinari, 82 F. Supp. 2d at 73 ("The reality is that all witnesses are partisan petition circulators whose goal is to convince voters to sign the petitions."). Moreover, even if we were to accept the defendants' understanding of petition circulators as quasi-public officials, rather than simply as advocates for a particular candidate, that characterization might just as easily lead us to conclude that district residents are even more likely to be motivated or well-positioned to engage in chicanery than non-residents, since district residents arguably have a stronger self-interest in which candidate ultimately gets elected and are more likely to be enmeshed in the intra-district political circles in which fraud might flourish.

The defendants' arguments based on the other two interests are even weaker, and both fail for similar reasons. Requiring a candidate to have a "modicum of support" within their district before their name appears on the ballot is well-established as a legitimate and important state interest, which helps to "avoid[ ] confusion, deception, and even frustration of the democratic process." *Jenness v. Fortson*, 403 U.S. 431, 442 (1971); *see also Prestia v. O'Connor*, 178 F.3d 86, 88 (2d Cir. 1999), *cert. denied*, 120 S. Ct. 539 (1999); *Schulz v. Williams*, 44 F.3d 48, 57-58 (2d Cir. 1994); *LaRouche v. Kezer*, 990 F.2d 36, 39 (2d Cir. 1993). However, that interest already is advanced by the requirement that candidates obtain a minimum number of signatures from district residents. *See* N.Y. ELEC. L. § 6-136 (McKinney 1998) (specifying number of signatures required from within a given political subdivision in order to gain access to ballot for various public offices). In light of that requirement, the state's interest in requiring a "modicum of support" from within the district

bears no relationship whatsoever to who actually witnesses or circulates the petition. *See Grant*, 486 U.S. at 425-26; *Krislov*, 226 F.3d at 865; *Molinari*, 82 F. Supp. 2d at 74; *Rockefeller v. Powers*, 917 F. Supp. 155, 164 (E.D.N.Y.), *aff'd*, 78 F.3d 44, 46 (2d Cir. 1996).

The defendants' final asserted interest — preventing non-resident witnesses from "imposing" the costs of a primary upon a district's residents fails for similar reasons. As with their assertion of the state's interest in ensuring a "modicum of support" from within the district, the defendants' argument with respect to the "imposition of primary election costs" appears to misunderstand the nature of the ballot access process — for candidates only are placed on the ballot if they obtain the requisite number of signatures by registered party members from within the electoral district, no matter where the witnesses live.[15] *See Molinari*, 82 F. Supp. 2d at 74. On the other hand, to the extent that the defendants mean to argue that the witness residence requirement helps to prevent non-residents from influencing politics within the district, that interest does not appear to be legitimate at all. A desire to fence out non-residents'

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15. We do not understand the defendants' argument to refer literally to the direct financial "costs" of holding a primary election, since the expenses associated with holding elections are not borne by district residents alone, but rather constitute "a charge upon the town or city . . . [or] village in which such election district is situated." N.Y. ELEC. L. § 4-136(1) (McKinney 1998). However, even if district residents were, in fact, somehow directly responsible for the costs of holding a primary election, those expenses only would be incurred after a sufficient number of district residents had themselves indicated their assent by signing the designating petition of an eligible candidate. *See Molinari*, 82 F. Supp. 2d at 74.

political speech — and to prevent both residents and non-residents from associating for political purposes across district boundaries — simply cannot be reconciled with the First Amendment's purpose of ensuring "the widest possible dissemination of information from diverse and antagonistic sources." *Krislov*, 226 F.3d at 866 (quoting *Buckley v. Valeo*, 424 U.S. 1, 49 (1976)); *see also Warren v. Fairfax County*, 196 F.3d 186, 190 (4th Cir. 1999) (en banc) (invalidating law prohibiting non-residents from using public forum); *VanNatta v. Keisling*, 151 F.3d 1215, 1218 (9th Cir. 1998) (invalidating law prohibiting candidates from accepting campaign contributions from outside their district), *cert. denied*, 525 U.S. 1104 (1999). In any event, the strength of this asserted interest in preventing outsiders from influencing politics within the district is undermined by the exception to the residence requirement that permits notaries public and commissioners of deeds — even if they live outside the relevant political subdivision — to circulate and witness candidates' ballot access petitions. *See* N.Y. ELEC. L. § 6-132(3) (McKinney 1998) (exception for notaries public and commissioners of deeds); *Molinari*, 82 F. Supp. 2d at 74.

Finally, the argument that the witness residence requirement does not affect Lerman's "absolute right to enter the 50th district . . . [to] express, as vigorously as she desired, her views and opinions about the issues facing the voters in that district and the candidates for the City Council" Supp. Brief of Defendant-Appellee Governor George E. Pataki at 7, is irrelevant. "We have consistently refused to overlook an unconstitutional restriction upon some First Amendment activity simply because it leaves other First Amendment activity unimpaired." *California Democratic Party v. Jones*,

120 S. Ct. 2402, 2412 (2000); *see also Grant*, 486 U.S. at 424 ("That appellees remain free to employ other means to disseminate their ideas does not take their speech through petition circulators outside the bounds of First Amendment protection."). *Cf. American Constitutional Law Found.*, 119 S. Ct. at 644 ("The ease with which qualified [individuals] may register to vote . . . does not lift the burden on speech" placed by voter registration requirement for petition circulators). The fact that the witness residence requirement "leaves open 'more burdensome' avenues of communication," therefore, "does not relieve its burden on First Amendment expression." *Grant*, 486 U.S. at 424.

Since the section 6-132(2) witness residence requirement does not bear *any* relationship to the asserted state interests, we conclude that the statute has no "plainly legitimate sweep" at all, *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973), and is therefore invalid on its face under the overbreadth doctrine. For the same reason, the plaintiffs would prevail even if we applied the *Salerno* standard, since they sufficiently have demonstrated that "no set of circumstances exists" in which the witness residence requirement constitutionally could be applied.

CONCLUSION

We hold that the requirement under Section 6-132(2) of the New York Election Law that witnesses to ballot access designating petitions be residents of the political subdivision in which the office is to be voted violates the First Amendment on its face. We therefore REVERSE the District Court's judgment and REMAND with instructions to enter judgment consistent with this opinion.

APPENDIX B — TRANSCRIPT OF CIVIL CAUSE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK FOR ORDER TO SHOW CAUSE DATED AUGUST 31, 1999

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV-99-4901 (NG)

LERMAN,

Plaintiff,

v.

BOARD OF ELECTIONS,

Defendants.

August 31, 1999

Brooklyn, New York

TRANSCRIPT OF CIVIL CAUSE FOR
ORDER TO SHOW CAUSE
BEFORE THE HONORABLE FREDERIC BLOCK
UNITED STATES DISTRICT JUDGE

* * *

[2] THE CLERK: Civil cause for order to show cause, Lerman versus Board of Elections.

Appendix B

I'd ask Counsel if you can please step forward and state your appearances for the record.

THE COURT: What I suggest, folks, as you're walking up here, is that we've already had oral argument on this. I'm going to orally deliver my decision. If there's anybody that wants to make any further comments briefly before I do so, I'll give you the opportunity to do that. Otherwise, I'll just tell you what my decision is and I'll try to give some hopefully rational basis for it, and then you can take this as a final determination. Should anybody wish to go forward with it to the Second Circuit Court of Appeals, you can do so immediately.

Does anybody wish to comment?

MR. RICHMAN: Your Honor, Steven Richman, Counsel for the Board.

THE COURT: Yes.

MR. RICHMAN: I just wanted to make you aware that there were other issues involved at the hearing, including the lack of a valid Wilson Pakula (ph) certificate for this petition. The Board did not reach that specification because they ruled simply on the numbers, so that there will be other [3] grounds, if the matter is referred back to the Board, to disqualify this petitioner and this candidacy. Those were made timely, as per specifications.

THE COURT: Alright, but I'm going to dismiss the complaint, so that won't be — it will be academic.

Appendix B

Anybody else wish to comment?

MR. KOSINSKI: Your Honor, I'm Peter Kosinski from the State Board of Elections. I just want to note our appearance.

THE COURT: Alright, good to have you on board. Why don't you sit down and make yourself comfortable, in the mean time.

As I just mentioned, the Court's order will be to dismiss the complaint. It will be a final determination as a result thereof and the plaintiffs, if they desire to do so, will be able to immediately further their constitutional challenge to Section 6-132 of the election law, insofar as the fact that it requires a witness to be a resident of the affected election district.

That can be brought to the Circuit Court of Appeals and they can decide what the reach of *Buckley* ought to be. But after giving this careful consideration, I don't believe that *Buckley* calls for [4] the judicial invalidation of that provision of the election law.

Let me try to give you some understanding of how I arrived at that decision. What I will do is I will try to articulate it as clearly as I'm capable of doing so now and I'll get a transcript of this presumably tomorrow, and I'll probably edit it to put in citations and to clean up some grammatical aspects to it which may require some change in the draft of the transcript. I'll get it done by the end of the day tomorrow.

So in the mean time, you can file, Mr. Leeds, your appeal papers to the Circuit Court of Appeals, because you'll have a final order today, and I'll have the revisions, if there are any, to the oral decision that I'm rendering hopefully by the end of tomorrow, so that would be available to the Circuit Court forthwith as well.

Specifically, the plaintiffs seek a declaratory judgment and injunctive relief flowing therefrom to declare, as I have just indicated, that provision of Section 6-132 of the New York State Election Law unconstitutional, insofar as the fact that it requires witnesses to petitions for access to the ballot to be residents of the election district [5] affected.

Specifically, the case concerns the upcoming September 14, 1999 primary election for the Independence Party in the 50th New York City Council District in Staten Island. The plaintiffs allege that, once again, the provision of New York Election Law Section 6-132, which requires a witness to a designating petition to reside in the electoral district of the political office which the petition supports is unconstitutional under *Buckley v. American Constitution Law Foundation, Inc.*, 119 S. Ct. 636 (1999).

We have here two categories of plaintiffs, one represented by Anita Lerman, who resides outside of the 50th District, as a witness, and we have the plaintiffs Angelo D'Angelo and Pio D'Agostino, who were signators to the petition that was witnessed by Ms. Lerman.

In order for the putative candidate, John Sollazzo, to be on the ballot in this election, he would need 38 valid petition

signatures, which would be 5% of the registered 760 Independence Party members in the district.

The plaintiff Ms. Lerman, who lives in the 49th New York City Council District, solicited and [6] served as a witness for the plaintiffs Angelo D'Angelo and Pio D'Agostino, who were the signators to the petition to include Sollazzo on the primary ballot. D'Angelo and D'Agostino are enrolled members of the Independence Party and they live in the 50th District, and they are qualified voters of the Independence Party.

In total, Lerman witnessed a total of 58 signatures for Sollazzo's candidacy. On August 3rd, 1999, the New York City Board of Elections ruled that the 58 signatures witnessed by Ms. Lerman were invalid because she did not live in the district.

The three plaintiffs have brought their lawsuit against the New York City Board of Elections, which administers the primary election in the district pursuant to New York Election Law Section 3-200(1), and they also have joined as a defendant the New York State Board of Elections, which supervises the administration of state election laws and prepares sample designating petitions. *See* N.Y. Election L. Sec. 3-100. They have also named Governor Pataki, who is charged with the enforcement of the laws of the State of New York, including of course its election laws.

The lawsuit has been constituted as a [7] facial constitutional challenge to the witness residency requirement. In that respect, a facial challenge to a legislative act is the

most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the act would be valid. *See City of New York v. United States*, 179 F.3d 29, 33 (2d Cir. 1999) (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)) (upholding the constitutionality of provisions of the Welfare Reform Act and Immigration Reform Act).

Now in respect to *Buckley*, the Court notes the following particularly pertinent aspects of *Buckley* in respect to the case at hand. There the Supreme Court reviewed several Colorado laws, including the requirement that initiative petition circulators be registered voters. Under Colorado law, a circulator had to attach to each petition section an affidavit containing inter alia the circulator's name and address and a statement that "he or she has read and understands the laws governing the circulation of petitions."

There are further requirements: to require the circulator to attest to the fact that each signature was affixed in the circulator's presence; [8] that each signature thereon was the signature of the person whose name it purported to be; and that to the best of the circulator's knowledge and belief, each person signing the petition section was at the time of signing a registered elector.

The Court notes that in terms of the requirements of the New York Election Law, witnesses also have to attest to a number of factors; specifically, I believe, if I recall correctly, that the person who signed the petition did represent himself or herself as a qualified person who could sign the petition.

Appendix B

In *Buckley*, the Supreme Court majority opinion commented that the Tenth Circuit properly sought guidance from the Supreme Court's recent decisions on ballot access, namely *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), and handbill distribution, referencing *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995).

The Court in *Buckley* stated: "Initiative petition circulators, as recognized by the Tenth Circuit, resemble handbill distributors in that both seek to promote public support for a particular issue or position, and initiative petition circulators also resemble candidate petition signature gatherers, [9] however, for both seek ballot access."

The Court stated as follows: "As the Tenth Circuit recognized in upholding the age restriction, the six-month limit on circulation and the affidavit requirement, states allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally. We have several times said no litmus paper tests will separate valid ballot access provisions from invalid interactive speech restrictions. We have come upon no substitute for the hard judgments that must be made, but the First Amendment requires us to be vigilant in making those judgments, to guard against undue hindrances to political conversations and the exchange of ideas."

The Court therefore went on to detail that they were satisfied that the registration restriction in question in *Buckley* significantly inhibited communication with voters about proposed political changes, and was not warranted by the

state's purported interests in administrative efficiency, fraud detection, and informing voters.

Thus, the Court concluded that the registration requirement in *Buckley* imposed a burden [10] on political expression that the state failed to justify. The court commented about the fact that the state's dominant justification appeared to be its strong interest in policing law breakers among petition circulators and that the State of Colorado seeks to ensure that circulators will be amenable to the Secretary of State's subpoena power, which did not extend beyond the state's borders.

Notably, the Court in *Buckley* stated that the plaintiffs did not challenge Colorado's right to require that all circulators be residents, a requirement that, as the Tenth Circuit said, " 'more precisely achieved' the state's subpoena service objective." *Id.* at 644.

The Court concluded, "In sum, assuming that a residence requirement would be upheld as a needful, integrity-policing measure, a question we, like the Tenth Circuit, have no occasion to decide because the parties have not placed the matter of residence at issue, the added registration requirement is not warranted. That requirement cuts down the number of message carriers in the ballot access arena without compelling cause."

Clearly, *Buckley* deals with matters which address political conversation, the exchange of [11] ideas, more in line with basic First Amendment concerns about speech, whereas on the other hand, the case that we have now before

us is a classic ballot access type of case, and the distinction is not without significance.

Notably, Justice Ginsburg, in writing for the majority in *Buckley*, makes no mention at all of the Supreme Court's case in *Burdick*, which specifically addressed the issue of ballot access. There is some passing reference to *Timmons*, which, as I noted, was a ballot access case.

When we're dealing with clear ballot access cases, the Second Circuit has made it clear, subsequent to *Buckley*, in *Prestia v. O'Connor*, 178 F.3d 86, 88 (2d Cir. 1999), that the language of *Burdick* is particularly apt in assessing the constitutionality of state election laws.

There the Second Circuit recently said, in keeping with *Burdick*: "We balance the regulations burden on the First and Fourteenth Amendment rights of voters against the state interests advanced by the regulation, taking into consideration the extent to which the burden is necessary to the advancement of those interests. When the regulation severely restricts the relevant rights, it must be narrowly [12] drawn to advance a compelling state interest. But where the regulation imposes only reasonable, nondiscriminatory restrictions on those rights, the state's important regulatory interests are generally sufficient to justify the restrictions. In assessing the burden imposed by the challenged regulation, we view the regulation in light of the state's overall election scheme." *Id.*

Why Justice Ginsburg did not make reference to *Burdick* in the *Buckley* decision can be debated. Certainly she was

conscious of the court's decision in *Burdick*. Curiously, in response to Justice Thomas's lone concurring opinion, where he does draw upon *Burdick* as well as *Timmons* in his assessment of the concepts that should be applied, she notes in footnote 12 that "[o]ur decision is entirely in keeping with the now settled approach that state regulations imposing severe burdens on speech must be narrowly tailored to serve a compelling state interest." *Buckley*, 119 S. Ct. at 642 n.12.

What I cull from looking at *Buckley* and comparing that with *Burdick* and with *Timmons* and with *Prestia* is that when you're not dealing with ballot access cases — where a candidate is trying to be [13] placed on the ballot — then the conceptual analysis is more in keeping with basic principles of First Amendment freedom of speech. And there, as Justice Ginsburg did, the inquiry is whether the so-called restrictions on that type of speech are significantly inhibited namely, whether the regulations present undue hindrances to political conversations and the exchange of ideas.

We're not dealing with that type of case, from my perspective, here, except insofar as it could be argued perhaps that the petition gatherers, namely the witnesses, have some First Amendment interest in political conversation and exchange of ideas as they circulate these petitions.

So what are the interests that I glean in this particular case? We have two sets of plaintiffs. First we have those two folks who actually are signators, and their interest in signing the petition is fairly straight forward. They are expressing their desire to have placed on the ballot a candidate, presumably of their choice, or even if not of their

choice, somebody who they believe should have the right to stand for election in the primary election. And that person is somebody who, if elected, will be representing those signators as a [14] city councilperson and passing laws and acting in a way which will directly affect the rights of those people.

But that interest is one of ballot access, clearly. There is no restriction in terms of the speech or the exchange of political ideas, such as the initiative scenario in *Buckley*. I think that the way to analyze those plaintiffs' rights is strictly in accordance with the language reinforced in *Prestia*, taken from *Burdick*, and the Court does not believe that their interests are such that conjure up a strict type of scrutiny.

Notably in *Timmons*, in respect to ballot access, the Court specifically said: "Ballots serve primarily to elect candidates, not as a fora for political expression." *Timmons*, 520 U.S. at 363. So the Supreme Court has clearly drawn a distinction between ballot access, which it does not perceive to be a fora for political expression on the one hand, and cases such as *Buckley*, which more closely reflect a serious challenge to political expression, where we're talking about broad-scale initiatives to allow the public to express itself on matters of public interest of a statewide nature. So there is that distinction, which I think has to be recognized in [15] assessing the rights of the parties here.

With respect to the interests of the witness, specifically Ms. Lerman's interest, she does not have any interest in who is going to be governing here. The person who will be elected from the 50th District has no jurisdiction over her district.

Her interest, arguably, could relate to some First Amendment speech concerns, but it seems marginally so.

I guess, to the extent that she would like to broaden the elective process or be able to express her ideas when she walks into the 50th District, her speech is affected. A petition gatherer for ballot access would have the absolute right to express her opinion or her thoughts about any of the issues in the upcoming election, the qualifications of candidates whom she believes would be the best candidate from that district. That would be expressive speech which would be, arguably, perhaps worthy of some First Amendment considerations, though marginally so, because once again, she's not going to be affected by the election results.

Her status as a witness, separate and apart from her status as a person who can articulate her opinions or beliefs about anything she wants as [16] she goes door to door collecting petitions, is somewhat different. There she's serving in a somewhat ministerial capacity, just to have the petition gatherers sign in her presence and to attest, under penalties of perjury, that the requirements of the election law have been complied with. But that seems to me a different interest than the interests subsumed by her ability to speak out on any particular issue.

There is nothing that prevents Ms. Lerman from doing that in the residency requirement. There is no correlation to that arguable First Amendment interest, because she could walk into that district or any other district she wants and say whatever she wants to anybody that she comes upon in that district. But her status as a witness is not one that significantly

affects, if at all, the interests that are identified by the Supreme Court in *Buckley*, namely once again, political conversation and exchange of ideas. Therefore, we're not dealing with anything that requires strict scrutiny in respect to the interests of any of the plaintiffs in this case.

The specific language from *Prestia* and from *Burdick*, et cetera, is that where the regulation imposes only reasonable, non-discriminatory [17] restrictions on the rights of a party, the state's important regulatory interests are generally sufficient to justify the restrictions. The regulations impose only reasonable, nondiscriminatory restrictions on the rights of the signators to the petition, because these folks clearly have ample opportunity to support the candidacy of anyone they choose to support in their particular party.

They don't have to necessarily wait until somebody comes knocking on the door and just function in that passive, hopeful role that somebody will come with a petition for them to sign to support a candidate. They can take a more proactive course of conduct. They can serve as a petition gatherer — as witnesses in their own right. There's nothing that prevents the signators from doing that, from organizing, from reaching out to other residents, other qualified voters in the district to support a particular candidate.

I just cannot conclude that there is a compelling interest here on behalf of the signators to wait for somebody to come with a petition for them to be able to express the rights to ballot access that are identified in the law. So I view the rights [18] of the signators and whatever restrictions can arguably be conjured up in terms of the witness residency

requirement to be just reasonable, nondiscriminatory restrictions at best on their rights. Therefore, you have to analyze the state's regulatory scheme in light of that.

Once again, as far as the restrictions on the interests of the witness herself, I find them to be not terribly compelling. Arguably in that respect, it may well be that a higher authority would find that the witness doesn't have standing under *United States v. Hays*, 515 U.S. 737 (1995). *Hays* instructs us that it is settled that as far as constitutional minimum standing requirements are concerned, we're dealing with three elements; one, that the plaintiff must have suffered an injury in fact, namely an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; second, there must be a causal connection between the injury and the conduct complained of; and, third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

In dealing with the interests of Ms. [19] Lerman, I find that arguably she may be able to assert some standing vis-á-vis her First Amendment rights to express her views and exchange ideas. But it's very questionable, because basically her function as a witness is strictly to act in a much more administrative or ministerial capacity than to serve as a basis for promoting her opportunities to articulate her views on any particular public issue. But nonetheless, in light of my decision, the standing issue is not terribly compelling here, because I'm deciding the case on the merits, in any event.

Appendix B

So what are the interests that are put forth here by the state? The residency requirement will help assure the integrity in the election of the 50th District by guaranteeing that local residents, for whom the election will have the most direct effect, are most involved in the process. By contrast, non-residents will not be governed by the results of the election outcome and have no particular motivation to assure its integrity.

Individuals who seek to influence elections outside of their own election districts may have interests correlated to advancing the goals of their party. But in terms of the interests to ensure [20] that the best representatives of the community are chosen to govern, it does not have any cogency, because they're not going to be subject to that governance.

The issue of preserving order is one that we should reflect upon. The state has an interest in preserving order and preventing chaos in the electoral process, and preventing a flood of out of district witnesses will help preserve order. As the Supreme Court said in *Buckley*, "We have also recognized, however, that 'there must be a substantial regulation of elections if they are to be fair and honest, and if some sort of order, rather than chaos, is to accompany the democratic processes.' " *Buckley*, 119 S. Ct. at 640 (citation omitted).

The issue of prevention of fraud is also something which should be reflected upon. I believe that the residency requirement does have some correlation to the prevention of fraud. The local Board of Elections has copies of the party

members' buff cards, which contain the members' signatures, which can be used to verify the witnesses' signatures.

It would be more difficult for the [21] election board to verify signatures using buff cards from places remote in the state, and we all know that these decisions have to be made very quickly and courts have to be able to make quick decisions, also, witnessed by the fact that it's now 25 to 7:00 and I'm trying to make this decision expeditiously, right now, as we speak. Also, it is more likely that a witness from a political district will be familiar with the signators and able to verify their identity, which also will help avoid any possible fraud.

The Court notes with interest that you can have statewide elections, you can have elections that cover congressional districts, you can have elections that cover very small districts, such as maybe councilman districts or maybe even smaller units. The issue of fraud is something which could perhaps be analyzed separately in respect to the particular election that's extant.

For example, if we're dealing with the statewide election system, then the residency requirement is one which doesn't have any necessary correlation to fraud within the State of New York, because the witness gatherer can go to any reaches of the State of New York and get signatures from all over the state, and the subpoena power applies [22] statewide.

In *Buckley*, the Court intimated that it may well be that the residency requirement in terms of statewide initiatives would be a relevant factor, because it would prevent people

from outside of the state from coming into the state to gather petitions, and those people would be outside of the reach of the subpoena power of the State of Colorado. So we're not dealing with problems with reaching witnesses in terms of the subpoena power, when we talk about statewide elections because the subpoena power is statewide.

Notably, on a statewide election basis, everybody who is involved with a statewide office has exactly the same interest. The person who is going to be elected will be governing that person and they have a direct interest in the outcome of the election.

That same issue is marginalized and minimized as we go down the line to the smaller districts. As witnessed by Ms. Lerman, she has no interest in the councilmanic district, specifically the 50th District, in terms of governance by who is going to be elected. She would have an interest if she was a petition gatherer on a statewide election.

[23] But nonetheless, we are not dealing with an as-applied challenge; we're dealing with a facial challenge. And the residency requirement is clearly applicable on a statewide basis in statewide elections. I think it also is applicable in respect to the local elections as well. But perhaps if we're dealing with an as-applied challenge, the analysis might be somewhat different, but here we're dealing with a facial challenge.

The Court, in any event, even if it was an as-applied challenge, would nonetheless find that the regulation is appropriate, moreso perhaps because the witness does not

have any stake in the election in the particular localized district and has no particular interest in maintaining the integrity of the elective process or is certainly not comparable to somebody who is a witness who resides in the affected election district.

So in sum, while I have burdened you with all of my commentary, the Court finds that whether you view this as a classic political speech case à la *Buckley*, or one that's more confined to ballot access, such as *Prestia*, *Timmons* and *Burdick*, regardless of how these different types of scenarios are conceptualized in terms of First Amendment [24] issues, we do not have any significant constitutional inhibition here that's been visited upon Ms. Lerman, assuming that she even has standing to bring her litigation.

In respect to the people who signed the petitions, it cannot be said that the witness requirement constitutes a serious impediment to their rights. In fact, I don't see where it constitutes any impediment to their rights whatsoever. Once again, for people to wait until somebody comes knocking on their door in order to express their choice of their candidate seems like the type of passive act which cannot rise to the level of any significant constitutional issue or restriction on their right to support whoever it is they wish to support.

Notaries public come into play here. To the extent that notaries public can be reached throughout the State of New York, certainly that aids in the process that would be available to gather signatures from any district, in any election, throughout the State of New York. These people

are qualified public officials and they have a different status than witnesses in general. This also applies to a commissioner of deeds. It does not undermine [25] the residency requirement, namely that they are treated differently than witnesses otherwise.

I cite the case of *In Re Patterson*, 312 N.Y. S.2d 300, 303 (3d Dep't 1970), confirming that which we know, that a notary is a public officer, and *Sumkin v. Hammonds*, 677 N.Y. S.2d 734 (S. Ct. Nassau County, 1998), stating, "A notary public is a public official and as such assumes a position of trust which demands a high degree of conscientious public service. A notary public must carry out her duties and functions only in accordance with the law. This is vital if the public interest is to be served." These nonelected public officials are deemed to be nonpartisan and their interests are deemed to be aligned with those of the state, to assist in the protection of the integrity of the electoral process.

So the notaries public serve a two-edged sword, as do the commissioners of deeds. I think they are compatible, by reason of the public trust that they assume, with the thought of maintaining some integrity in the electoral process. Second, they increase the pool of those folks who can come into any particular election district, to make it even more easy for somebody who wishes to support a particular candidate, to gather signatures, to put [26] that person on the ballot.

So in sum, the Court will dismiss the plaintiffs' complaint in all respects. We'll try to clean up my verbalizations

forthwith, so you can have the benefit of whatever I've said today to present to the Second Circuit, should you wish to do that.

Are there any residual matters that need to be attended to here?

MR. LEEDS: Just one, your Honor.

THE COURT: Yes.

MR. LEEDS: Could the Court transmit the file to the Second Circuit?

THE COURT: I'll ask Mr. Innelli, the court clerk, to assist you as best as we can to expedite the administrative matters that you have to attend to to get the matter to the Second Circuit, okay?

MR. LEEDS: Thank you.

THE COURT: Thank you very much for all of your assistance.

* * * *

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DISMISSING PLAINTIFF'S COMPLAINT DATED SEPTEMBER 1, 1999

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Cv-99-4901(NG)

ANITA LERMAN.,

Plaintiff,

– vs –

BOARD OF ELECTIONS, et. al.,

Defendants.

ORDER

For the reasons stated on the record at oral argument on August 31, 1999, the plaintiff's complaint is dismissed in it's entirety.

SO ORDERED.

s/ Frederic Block
UNITED STATES DISTRICT
JUDGE

DATED: Brooklyn, N.Y.
September 1, 1999

APPENDIX D — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DISMISSING PLAINTIFF'S COMPLAINT DATED AND FILED SEPTEMBER 3, 1999

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

99-CV-4901 (NG)

ANITA LERMAN,

Plaintiff,

– against –

BOARD OF ELECTIONS, et al.,

Defendants.

JUDGMENT

An Order of the Honorable Frederic Block, United States District Judge, having been filed on September 3, 1999; for the reasons stated on the record at oral argument on August 31, 1999 dismissing the plaintiff's complaint in its entirety; it is

ORDERED and ADJUDGED that the plaintiff take nothing of the defendants; and, that the plaintiff's case is dismissed in its entirety.

Appendix D

Dated: Brooklyn, New York
September 3, 1999

ROBERT C. HEINEMANN
Clerk of Court

By: s/ James Giokas
JAMES GIOKAS
Chief Deputy Clerk

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED DECEMBER 13, 2000

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 13th day of December two thousand

Present:

Hon. Wilfred Feinberg

Hon. Dennis Jacobs

Hon. Chester J. Straub

CIRCUIT JUDGES,

Docket No. 99-9015

Lerman,

Appellant,

v

Appendix E

Board of Elections,

Appellee.

A petition for panel rehearing having been filed herein by New York State Board of Elections

Upon consideration thereof, it is

Ordered that said petition be and it hereby is **DENIED.**

FOR THE COURT
ROSEANN B. MACKECHNIE,
Clerk

By: s/ Beth J. Meador
Beth J. Meador
Administrative Attorney

DEC 13 2000

MAY 16 2001

OFFICE OF THE CLERK

No. 00-1360

IN THE

Supreme Court of the United States

NEW YORK STATE BOARD OF ELECTIONS,

Petitioner,

v.

ANITA LERMAN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Second Circuit was correct in holding that New York's political subdivision residence requirement for candidate petition witnesses, which is imposed in addition to an in-state residence requirement and a party registration requirement, violates the First Amendment because it imposes a severe burden on political speech and is not narrowly tailored to serving compelling government interests?

PARTIES TO THIS PROCEEDING

The petitioner in this case is the New York State Board of Elections ("State Board"), which was a defendant below.

Respondents are Anita Lerman, who served as a petition witness for a New York City Council candidate in 1999, and Angelo D'Angelo, who signed the petition carried by Lerman. Respondents Lerman and D'Angelo were plaintiffs below, along with another petition signer, Pio D'Agostino. D'Agostino was not a party to the proceeding before the Second Circuit as he did not appeal from the district court's adverse decision, and thus is not a party to this proceeding under this Court's Rule 12.6.

Also named as defendants below, but not filing a petition for certiorari and thus denominated respondents under Rule 12.6, are George A. Pataki, Governor of the State of New York, and the Board of Elections of the City of New York ("City Board").

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to this Proceeding	ii
Table of Contents	iii
Table of Cited Authorities	v
Constitutional and Statutory Provisions Involved	1
Statement of the Case	2
A. Factual Background and District Court Proceedings	2
B. Decision of the Second Circuit	4
Reasons for Denying the Writ	7
I. The Question Presented Is Not Appropriate for Certiorari Review.	8
A. There Is No Conflict in the Lower Courts on the Question Presented for this Court's Review.	8
B. The Question Urged by Petitioners Was Correctly Decided Below.	12
II. Even if the Question Presented Were to Merit this Court's Review, this Case Is Not an Appropriate Vehicle for Doing So.	15

Contents

Page

A. Petitioner Has Waived Any Argument That the Political Subdivision Residence Requirement of § 6-132(2) Satisfies Strict Scrutiny. 15

B. A Substantial Question Exists As to Whether Petitioner Is Precluded from Defending the Constitutionality of § 6-132(2) Here. 17

Conclusion 19

TABLE OF CITED AUTHORITIES

Page

Cases:

Browne v. Russell, 27 Cal. App. 4th 1116 (Cal. Ct. App. 1994) 10

Buckley v. American Constitutional Law Found., 525 U.S. 182 (1999) ..... *passim*

Campbell v. Buckley, 203 F.3d 738 (10th Cir. 2000) 11

Hart v. Secretary of State, 715 A.2d 165 (Me. 1998), *cert denied*, 525 U.S. 1139 (1999) 11

Initiative & Referendum Inst. v. Jaeger, 241 F.3d 614 (8th Cir. 2001) 11

Kean v. Clark, 56 F. Supp. 2d 719 (S.D. Miss. 1999) 11

Krislov v. Rednour, 226 F.3d 851 (7th Cir. 2000), *cert. denied*, 121 S. Ct. 1085 (2001) 7, 9, 10, 12

KZPZ Broad., Inc. v. Black Canyon Concerned Citizens, 13 P.3d 772 (Ariz. Ct. App. 2000) 10

Lawrence v. Jones, 18 P.3d 1245 (Ariz. Ct. App. 2001) 10

Cited Authorities

Page

McGuffage v. Krislov, 121 S. Ct. 1085 (2001) 9

McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995) 5

Meyer v. Grant, 486 U.S. 414 (1988) 8, 12, 14, 16

Molinari v. Powers, 82 F. Supp. 2d 57 (E.D.N.Y. 2000) 4, 9, 13, 17, 18

Tobin for Governor v. Illinois State Bd. of Elections, 105 F. Supp. 2d 882 (N.D. Ill. 2000) 10

Young v. Illinois State Bd. of Elections, 116 F. Supp. 2d 977 (N.D. Ill. 2000) 10

United States Constitution:

First Amendment ..... i, 1, 7, 9, 12

Fourteenth Amendment 1

Statutes:

N.Y. Elec. Law § 6-132(2) ..... *passim*

N.Y. Elec. Law § 6-132(3) 13

N.Y. Elec. Law § 6-136(2) 3

Cited Authorities

Page

Other Authorities:

Bill Jacket, Ch. 351 § 1 of N.Y. Laws of 1951 15

82 Ops. Cal. Atty. Gen. 250 (1999), 1999 WL 1249548 (Cal. A.G.) 11

Respondents Anita Lerman and Angelo D'Angelo respectfully submit this brief in opposition to the Petition for Certiorari filed by the New York State Board of Elections in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a challenge to § 6-132(2) of New York's Election Law based on the First and Fourteenth Amendments to the United States Constitution.

United States Constitution, Amendment I, provides in relevant part:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of greiveances.

United States Constitution, Amendment XIV, § 1, provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York Election Law § 6-132(2), provides in relevant part:

> There shall be appended at the bottom of each sheet a signed statement of a witness who is a duly qualified voter of the state and an enrolled voter of the same political party as the voters qualified to sign the petition, and who is also a resident of the political subdivision in which the office or position is to be voted for. However, in the case of a petition for election to the party position of member of the county committee, residence in the same county shall be sufficient. Such a statement shall be accepted for all purposes as the equivalent of an affidavit, and if it contains a material false statement, shall subject the person signing it to the same penalties as it he had been duly sworn.

STATEMENT OF THE CASE

This case involves a challenge to the constitutionality of New York's requirement, contained in N.Y. Elec. Law § 6-132(2) (McKinney 1998), that witnesses carrying nominating petitions for political candidates must reside within the political subdivision where the candidate is running for office.

A. Factual Background and District Court Proceedings

To gain access to the primary election ballot in New York, candidates must obtain a certain number of nominating petition signatures from registered voters who are party members residing in the political subdivision where the candidates are running for office. Section 6-132(2) imposes restrictions on who may serve as petition witnesses

and circulate petitions to gather these signatures. The section requires that petition witnesses not only must be registered voters and party members, but also, like petition signers, must reside in the political subdivision where the candidate is running for office.

Respondent Anita Lerman served as a petition witness for John Sollazo, who was seeking access to the September 14, 1999 primary of the Independence Party in order to become the Independence Party's candidate for the 50th New York City Council district, located in Staten Island. To gain access to the Independence Party ballot Sollazo needed to obtain 38 signatures, representing 5% of the registered Independence Party members in the 50th district.[1] In her role as petition witness, Lerman witnessed a total of 58 nominating signatures for Sollazo, including a signature from respondent Angelo D'Angelo. However, all of the signatures Lerman gathered on Sollazo's behalf were subsequently invalidated because, although Lerman is a registered voter and Independence Party member, she resides in the neighboring 49th City Council district — also located in Staten Island — instead of the 50th district where Sollazo was running. As a result, Sollazo failed to obtain the 38 valid signatures he needed to appear on the Independence Party's primary ballot.

Respondents then filed a *pro se* complaint[2] against petitioner, the City Board and Governor Pataki. Respondents

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1. For City Council races, candidates are required to obtain signatures from 5% of resident party members, or 900 signatures, whichever is less. *See* N.Y. Elec. Law § 6-136(2).

2. Counsel for respondents first appeared when this case was on appeal after briefing was completed, and participated in oral argument and subsequent supplemental briefing ordered by the Second Circuit.

sought to have the petition witness residence requirement of § 6-132(2) declared unconstitutional and enjoined as violating the First and Fourteenth Amendments. The City Board filed a motion to dismiss which the U.S. District Court for the Eastern District of New York (Block, J.) granted, in a decision issued from the bench during a hearing on respondents' Order to Show Cause.

While this case was pending on appeal, the constitutionality of § 6-132(2)'s petition residence requirement was addressed again in a separate lawsuit which garnered far greater public attention and concerned the application of New York's ballot access rules in the context of the Republican Presidential Primary. *See Molinari v. Powers*, 82 F. Supp. 2d 57 (E.D.N.Y. 2000) (Korman, C.J.). Notwithstanding their continued assertion of § 6-132(2)'s constitutionality on appeal in this case, the State and City Boards stipulated in *Molinari* that the requirements for access to the Republican Presidential Primary ballot imposed an undue burden on political speech, and the district court accepted this stipulation only after concluding that the Republican primary ballot access "scheme, both in its totality and by virtue of two of its individual but related elements" — one of which was the petition witness residence requirement of § 6-132(2) — was unconstitutionally burdensome. *Id.* at 69. Pursuant to the stipulation, neither the State nor City Board appealed from the district court's determination in *Molinari* that § 6-132(2)'s witness residence requirement was unconstitutional.

B. Decision of the Second Circuit

On appeal in this case, a unanimous panel of the Second Circuit sided with the district court in *Molinari* and ruled § 6-132(2)'s requirement that candidate petition witnesses must

reside in the political subdivision where the candidate is running was facially unconstitutional.[3]

The Court of Appeals held that the petition witness residence requirement should be subject to strict scrutiny. It found strict scrutiny applicable first because the petition witness residence requirement, like the registered voter requirement at issue in *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999) ("*ACLF*") and the prohibition on anonymous leaflets at issue in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), "directly restricts 'core political speech' as opposed to the 'mechanics of the electoral process.' " Pet. App. at 18a (quoting *ACLF*, 525 U.S. at 207-08 (Thomas, J., concurring)) (additional internal quotations omitted). The court additionally held that strict scrutiny would be appropriate even if § 6-132(2)'s petition witness residence requirement was viewed more as an election process regulation, because the "requirement severely burdens political speech by 'dramatically reduc[ing] the number of persons . . . available to circulate petitions' " and inhibits political association. *Id.* at 19a-21a (quoting *ACLF*, 525 U.S. at 193). Specifically, it emphasized that the requirement served to render all but 760 of the 170,000 registered Independence Party members in New York State, or 99.5%, ineligible to witness candidate petitions in the 50th City Council district. *See id.* at 21a. It also noted

---

3. After seeking briefing on the question of whether the defendants in this action were collaterally estopped from asserting § 6-132(2)'s constitutionality by virtue of their stipulation and failure to appeal in *Molinari*, the Second Circuit declined to decide this issue, stating "the preclusion issue is close . . . and . . . the merits of this case are not." Pet. App. at 7a-8a. The appeals court also rejected the City Board's claim that this action was moot and that respondents lacked standing. *See id.* at 8a-16a.

that signature gathering is particularly burdensome for minor party candidates or candidates who are not favored by the party leadership and therefore do not have easy access to the resources needed to ensure a place on the ballot. *See id.* at 22a.

The Second Circuit then reviewed the three government interests asserted as justifications for § 6-132(2)'s petition witness residence requirement — "(1) ensuring integrity and preventing fraud in the electoral process; (2) ensuring that candidates demonstrate a sufficient modicum of support before their name is included on the ballot; and (3) ensuring that non-residents may not impose the cost of a primary on the district" — and concluded that the "requirement does not bear even a *rational* relationship to any of these three justifications, let alone the narrowly tailored relationship that strict scrutiny demands." *Id.* at 26a (internal quotations omitted). While noting that New York unquestionably had a compelling interest in ensuring electoral integrity and preventing fraud, the court found that the petition witness residence requirement "does nothing to advance this end" because under unchallenged portions of § 6-132(2) petition witnesses must be registered voters in the state and provide their residence address in an affidavit. These measures, combined with the statewide subpoena power of local election boards, sufficed to ensure that petition witnesses are subject to the state's jurisdiction. *Id.* at 26a-28a.

Similarly, the appeals court found that the state's interests in ensuring local support for candidates was "already advanced by the requirement that candidates obtain a number of signatures from district residents," as was the interest in avoiding outsider-imposed primaries. *Id.* at 31a-32a. It also underscored that insofar as the defendants were attempting to justify the witness residence requirement on the grounds that it "helps to prevent

non-residents from influencing politics within the district," such an interest was not legitimate and could not be reconciled with the First Amendment's commitment to "ensuring the widest possible dissemination of information." *Id.* at 32a-33a (internal quotations omitted).

REASONS FOR DENYING THE WRIT

The question presented by petitioner is not appropriate for certiorari review. There is no conflict in the lower courts on the question of whether requiring candidate petition witnesses to reside in the political subdivision where the candidate is running for office violates the First Amendment. On the contrary, the well-reasoned opinion of the Second Circuit is completely consistent with other lower court decisions on point, including a Seventh Circuit decision on which this Court recently denied certiorari. *See Krislov v. Rednour*, 226 F.3d 851 (7th Cir. 2000), *cert. denied*, 121 S. Ct. 1085 (2001). The question urged by petitioner is also inappropriate for certiorari review because the Second Circuit's decision below is correct and carefully applies the governing analysis laid out by this Court in *ACLF* and in other opinions. Moreover, even if the question presented were to merit this Court's review, this case is not an appropriate vehicle for doing so given that petitioner has waived any argument that the witness residence requirement satisfies strict scrutiny and the presence of a substantial question as to whether petitioner is precluded from asserting the requirement's constitutionality.

I.

THE QUESTION PRESENTED IS NOT APPROPRIATE FOR CERTIORARI REVIEW.

A. There Is No Conflict in the Lower Courts on the Question Presented for this Court's Review.

Two years ago, in *ACLF*, this Court struck Colorado's requirement that ballot petition circulators must be registered voters as unconstitutional because it imposed a severe burden on political speech that was not warranted by the government interests asserted by the State. *See* 525 U.S. at 192-97. In reaching this conclusion, the Court applied a two step analysis under which it first determined that the requirement imposed a severe burden on political speech because, like the ban on paid circulators invalidated in *Meyer v. Grant*, 486 U.S. 414 (1988), it dramatically reduced the pool of individuals available to circulate petitions. *See ACLF*, 525 U.S. at 193-96; *Meyer*, 486 U.S. at 422-23. The Court then ruled that the interest Colorado asserted in defense of the voter registration requirement, "policing lawbreakers among petition circulators," was already met by Colorado's separate demand that circulators be state residents and provide affidavits attesting to their residence address. *ACLF*, 525 U.S. at 196. As a result, the Court concluded that the voter registration requirement failed its "now-settled approach" under which "state regulations imposing severe burdens on speech must be narrowly tailored to serve a compelling state interest." *Id.* at 192 n.12, 196-97 (internal quotations omitted).

There is no conflict in the lower courts regarding the application of the Supreme Court's decision in *ACLF* to

candidate petition witness requirements. On the contrary, the Second Circuit's decision below is completely consistent with other recent lower court decisions addressing the constitutionality of political subdivision residence requirements for candidate petition witnesses. In *Krislov*, a unanimous panel of the Seventh Circuit held that such a requirement contained in Illinois law violated the First Amendment.[4] *See* 226 F.3d at 866. Like the Second Circuit below, the Seventh Circuit concluded that Illinois' political subdivision residence requirement for petition circulators imposed a severe burden on political speech because it "prevent[s] the candidates from employing millions of potential advocates to carry their political message to the people of Illinois" and inhibits effective political association. *Id.* at 860-61. It then ruled that the state interests offered by Illinois to justify the rule failed to satisfy strict scrutiny, holding in particular that the residence requirement did not advance the state's interest in ensuring local support for candidates or preserving election integrity because these interests were already adequately served by other, more closely tailored provisions. *See id.* at 863-65. This Court denied a petition for certiorari in *Krislov* on February 20, 2001. *See McGuffage v. Krislov*, 121 S. Ct. 1085 (2001).

While *Krislov* is the only recent federal circuit court decision directly on point, several federal district courts and intermediate state appellate courts similarly have struck down local residence requirements for petition witnesses. *See, e.g., Molinari*, 82 F. Supp. 2d at 73-77 (holding that § 6-132(2)'s political subdivision petition witness residence requirement violates the First Amendment

4. The court in *Krislov* also struck down Illinois' requirement that petition circulators be registered voters. *See* 226 F.3d at 866.

and stating that *ACLF* removes any doubt about § 6-132(2)'s constitutionality); *Lawrence v. Jones*, 18 P.3d 1245, 1252-53 (Ariz. Ct. App. 2001) (reading city code provision as allowing circulation of referenda by nonresidents of city on grounds that a city residence requirement would be unconstitutional under *ACLF*); *KZPZ Broad., Inc. v. Black Canyon Concerned Citizens*, 13 P.3d 772, 778-80 (Ariz. Ct. App. 2000) (reading Arizona law as allowing circulation of county referenda by nonresidents of county on grounds that a county residence requirement would be unconstitutional under *ACLF*); *cf. Young v. Illinois State Bd. of Elections*, 116 F. Supp. 2d 977, 985 (N.D. Ill. 2000) (holding unconstitutional under *ACLF* an Illinois requirement, separate from that at issue in *Krislov*, which required that petition circulators be registered voters in the political subdivision where the petition is being circulated, but focusing on the registered voter requirement); *Tobin for Governor v. Illinois State Bd. of Elections*, 105 F. Supp. 2d 882, 887-88 (N.D. Ill. 2000) (same).

Other than the district court's bench opinion in this case, reversed by the Second Circuit, the only decision upholding a local residence requirement for petition witnesses is an earlier, pre-*ACLF* decision from a California state court, *Browne v. Russell*, 27 Cal. App. 4th 1116, 1124-26 (Cal. Ct. App. 1994). *Browne* offers little support to petitioner, however, as it rests on the California court's case-specific determination that the plaintiffs failed to introduce sufficient evidence demonstrating that the residency requirement burdened their right of political expression. Moreover, *Browne*'s continuing authority after *ACLF* is questionable insofar as the decision holds that a reduction in the pool of available circulators is irrelevant in assessing burden. *See id.* at 1125; *see also KZPZ*, 13 P.3d at 779 (*Browne* "may

be questionable law after [*ACLF*]"); 82 Ops. Cal. Atty. Gen. 250 (1999), 1999 WL 1249548 at *2-*3 (Cal. A.G.) (initiative petition circulators need not declare that they are registered voters of city and therefore under statute need not be city residents).

To the extent that recent decisions have upheld residence requirements for petition witnesses, they have addressed in-state residence requirements, not political subdivision residence requirements. *See Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 616-17 (8th Cir. 2001) (upholding requirement that initiative petition circulators be state residents as not unduly burdensome and narrowly tailored to serve state's compelling interest in preventing fraud because residency ensures circulators are subject to state's subpoena power); *Kean v. Clark*, 56 F. Supp. 2d 719, 733 (S.D. Miss. 1999) (same); *Hart v. Secretary of State*, 715 A.2d 165, 168 (Me. 1998) (same), *cert denied*, 525 U.S. 1139 (1999). As the Second Circuit emphasized, § 6-132(2) separately requires petition witnesses to be state residents, and plaintiffs did not challenge this aspect of § 6-132(2) here.[5] *See* Pet. App. at 28a & n.14. Thus, there is no conflict between the Second Circuit's decision below and these lower court decisions sustaining such in-state residence requirements. Moreover, these decisions offer no support to petitioner on the question presented for this Court's review, as contrary to petitioner they hold that in-state residence requirements should be subject to strict scrutiny. *See, e.g., Jaeger*, 241 F.3d at 616; *Kean*, 56 F. Supp. 2d at 730; *Hart*, 715 A.2d at 167-68; *see also Campbell v. Buckley*, 203 F.3d 738, 745 (10th Cir. 2000) (noting, in

5. New York's in-state residence requirement is embodied in § 6-132's requirement that petition witnesses be "duly qualified voter[s] of the state."

sustaining Colorado's title setting requirements for ballot initiatives, that "strict scrutiny is applied where the government restricts. . . . the available pool of circulators or other supporters of a candidate or initiative" and more generally "where the government restricts the overall quantum of speech available to the election or voting process").

B. The Question Urged by Petitioners Was Correctly Decided Below.

The Second Circuit's analysis carefully hews to the approach and analysis laid out in *ACLF* in ruling that New York's political subdivision residence requirement for petition witnesses violated the First Amendment. *ACLF* and *Meyer* make clear that speech by petition witnesses is interactive political speech and discussion at the core of the First Amendment's protections. *See ACLF*, 525 U.S. at 199; *Meyer*, 486 U.S. at 421-22. While these cases addressed ballot petitioning rather than candidate petitioning, there is no basis to conclude that candidate petitioning is any less political speech — and indeed, petitioner does not make such a claim here. *See* Pet. App. at 23a-25a; *Krislov*, 226 F.3d at 861-62; *see also ACLF*, 525 U.S. at 232 (Rehnquist, C.J., dissenting) (arguing that the majority opinion in *ACLF* put registered voter requirements for candidate petition circulators in jeopardy).

As in *ACLF*, the Second Circuit examined the impact § 6-132(2)'s political subdivision residence requirement had on the pool of available witnesses. The appeals court's determination that the residence requirement drastically reduces the pool of available witnesses is plainly correct under *ACLF*. There, the disqualification of 21% of the

available petition circulator pool (400,000 of 1.9 million potential circulators) was found to impose a severe burden, whereas here the pool reduction is 99.5%. *See id.* at 193; Pet. App. at 21a. Reductions of similar magnitude are present in regard to any congressional, state legislative, or local race in the state, as there are inevitably far fewer registered party members residing in any political subdivision than reside in the state as a whole. *See, e.g., Molinari*, 82 F. Supp. 2d at 75 (noting that the witness residence requirement "reduces by approximately 2.9 million to 3 million voters the pool of Republicans available to volunteer to petition in any particular district.")

Contrary to the claim of petitioner, *see* Pet. at 7, the substantial reduction in pool of available petition witnesses wrought by the residence requirement is not altered by the fact that notaries and commissioners of deeds are allowed to serve as petition witnesses. Petitioner failed to introduce any evidence into the record regarding the number of notaries and commissioners of deeds in New York. In *Molinari*, however, the district court found that there were only 250,000 notaries public in the state as a whole, 82 F. Supp. 2d. at 76 n.11 — clearly an inadequate number to compensate for the millions of registered party members who may be precluded from carrying petitions by the witness residence requirement, even assuming every notary was willing to serve as a witness. Moreover, this option is far more burdensome than using party volunteers, as notaries and commissioners are required to have each signer swear that the information the signer provided on the petition is true, *see* N.Y. Elec. Law § 6-132(3), and candidates often must pay notaries for their services, *see Molinari*, 82 F. Supp. 2d. at 76-77. Again, the Second Circuit correctly adhered to binding precedent in not holding that the notary and

commissioner of deed exception rendered § 6-132(2)'s residence requirement constitutional, for as this Court stated in *Meyer*, that a law "leaves open more burdensome avenues of communication[] does not relieve its burden on First Amendment freedoms." 486 U.S. at 423 (internal quotations omitted).

The Second Circuit's conclusion that the interests asserted by the state fail to justify the witness residence requirement also follows directly from *ACLF*. Under *ACLF*, it is clear that New York's in-state residency requirement, combined with the further requirement that witnesses provide an affidavit as to their address, suffices to ensure that petition witnesses are subject to the state's oversight and enforcement jurisdiction. *See* 525 U.S. 196-97. Particularly given that local election boards enjoy statewide subpoena power, *see* Pet. App. at 28a, there is simply no basis for petitioner's suggestion that the political subdivision residence requirement at issue here is needed "to subject petition witnesses to the jurisdiction of the state's courts." Pet. at 7. *ACLF* further establishes that at a minimum a challenged provision must be narrowly tailored to serving an asserted state interest to justify imposing a severe burden on political speech. The Second Circuit's determination that the interests offered by petitioner failed this test is unassailable, given that such local involvement is already assured by making only district residents eligible to sign petitions and the state is willing to allow non-local participation in the case of notaries and commissioners of deeds.

It is also worth noting that the interests petitioner asserts in defense of § 6-132(2)'s political subdivision residence requirement are not found in the legislative history of the provision. The measure was adopted at the same time as the requirement that witnesses be party members, and the main

purpose offered in justification was preventing party raiding. *See* Bill Jacket at 12-13, Ch. 351 § 1 of N.Y. Laws of 1951 (Letter from Assemblyman Anthony J. Travia); *see also id.* at 16 (memorandum from Louis J. Lefkovitz, Counsel to the Joint Legislative Committee to Revise and Recodify the Election Law of New York) (restrictions on petition witnesses are reasonable because primary election serve to settle a dispute within the party). In fact, the legislative history suggests that the real purpose of the measure was hardly so benign: Assemblyman Travia, the bill's sponsor, expressly justified it as a means of curbing the influence of the American Labor Party in New York City and other comments indicate that another motive was to enhance the power of party machines. *See id.*; *see also id.* at 3-4 (letter from Citizens Union arguing that the bill will limit political competition and harm insurgents); *id.* at 7-8 (measure will favor political machines in local districts). But even taking the stated party raiding concern at face value, it is adequately addressed by the requirements — again, not challenged here — that petition witnesses and signers must be enrolled party members.

II.

EVEN IF THE QUESTION PRESENTED WERE TO MERIT THIS COURT'S REVIEW, THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR DOING SO.

A. Petitioner Has Waived Any Argument That the Political Subdivision Residence Requirement of § 6-132(2) Satisfies Strict Scrutiny.

In addition, there are two significant obstacles to using this case as the vehicle for this Court to consider the constitutionality of political subdivision residence

requirement, even if it were to determine that this question merits review. The first is that petitioner has waived any argument that the political subdivision residence requirement of § 6-132(2) satisfies strict scrutiny. Before the court of appeals, neither petitioner nor the other defendants attempted to justify the political subdivision residence requirement as narrowly tailored to realizing compelling government interests. *See* Br. of Gov. Pataki at 10; Br. of State Board at 4; *see also* Pls.' Supp. Reply Br. at 1-2 (noting that defendants "rest their defense on the claim that the [residence] requirement imposes a minor burden on [p]laintiffs' rights and is subject only to rationality review."). Similarly, petitioner here makes no claim that § 6-132(2)'s political subdivision residence requirement would survive strict scrutiny, but instead only contends that the Second Circuit erred in applying such exacting review because the residence requirement is not burdensome. *See* Pet. at 5.

As a result, this Court would be limited to reviewing whether the political subdivision requirement should be subject to strict scrutiny because it directly targets core political speech or because of its impact on the pool of potential petition witnesses — questions that this Court has already addressed and answered in *ACLF* and *Meyer*. It would be precluded from reaching the very issues on which this case differs from those earlier decisions: specifically, whether such local residence requirements can be justified by concerns with preventing election fraud and ensuring local involvement in elections.

B. A Substantial Question Exists As to Whether Petitioner Is Precluded from Defending the Constitutionality of § 6-132(2) Here.

The second problem with using this case as a vehicle for considering the constitutionality of political subdivision residence requirements is that a strong argument can be made that petitioner is precluded from asserting the constitutionality of § 6-132(2)'s residence requirement by its stipulation in *Molinari*. As the Second Circuit detailed, petitioner and the City Board stipulated that "several provisions of the New York Election Law impose[d] an undue burden on access to the ballot in connection with the 2000 New York State Republican Presidential Primary. . . . [and] also agreed to waive their rights to appeal from any order entered by the district court based on that stipulation." Pet. App. at 5a (internal quotations omitted). In his decision, Chief Judge Korman carefully examined the political subdivision residence requirement and held, like the Second Circuit below, that the requirement was unconstitutional because it imposed a severe burden on political speech and was unjustified "under any test." 82 F. Supp. 2d at 77.

After being informed of the *Molinari* stipulation by respondents' counsel at oral argument in this case,[6] the Second Circuit specifically sought additional briefing on the question of whether petitioner and the other defendants were precluded from continuing to defend the constitutionality of § 6-132(2)'s political subdivision residence requirement. Although the Second Circuit ultimately did not reach a decision on this issue, noting that the preclusion question was close while the merits of the case were not, it stated that

6. Respondents' counsel also represented the plaintiffs in *Molinari*.

it was "not untroubled by the possibility that the defendants have attempted to evade their stipulation in *Molinari*." Pet. App. at 7a.

Petitioner's actions in stipulating to the residence requirement's unconstitutionality in *Molinari* while continuing to press its constitutionality here provide strong equitable grounds against granting certiorari. This course of behavior looks disquietingly like an attempt to game the system: petitioner avoided defending the requirement on appeal in the context of a politically sensitive, high publicity case, yet sought to avoid being legally bound by that failure to defend through asserting the constitutionality of § 6-132(2) in this *pro se*, low profile, appeal.

In addition, the presence of this preclusion issue means that a reversal by this Court on the merits might not alter the result in this case. It would be inappropriate for the Court to resolve the preclusion issue in the first instance, particularly as petitioner has not raised this issue in the petition for certiorari. As a result, the Second Circuit would need to address preclusion on remand before it could rule in petitioner's favor. Moreover, the court of appeals' evident discomfort with defendants' behavior suggests that if forced to reach the issue, it might well rule that defendants were indeed precluded by the *Molinari* stipulation from asserting the residence requirement's constitutionality here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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(3)

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No. 00-1360

IN THE

Supreme Court of the United States

NEW YORK STATE BOARD OF ELECTIONS,

Petitioner,

v.

ANITA LERMAN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONSE OF GOVERNOR GEORGE E. PATAKI TO PETITION FOR A WRIT OF CERTIORARI

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Pursuant to the request of the Clerk of the Court by letter dated April 16, 2001, respondent George E. Pataki, Governor of the State of New York ("Governor"), submits this response to the petition for writ of certiorari filed by the New York State Board of Elections ("State Board"). The Governor — together with the State Board, petitioner in this Court, and the Board of Elections in the City of New York — was defendant-appellee in the court below.

The Governor takes no position with respect to the petition for certiorari filed by the State Board herein.

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00-1360 (4)

No. 00-

In the
SUPREME COURT OF THE UNITED STATES

NEW YORK STATE BOARD OF ELECTIONS,
Petitioner,

v.

ANITA LERMAN, and ANGELO D'ANGELO,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF DEFENDANT BOARD OF ELECTIONS OF THE CITY OF NEW YORK IN SUPPORT OF THE PETITION

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1618

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

ARGUMENT

THE DETERMINATION OF THE COURT OF APPEALS RAISES THE QUESTION OF WHETHER A STATE ACTS CONSTITUTIONALLY PURSUANT TO THE FIRST AND FOURTEENTH AMENDMENT WHEN IT REQUIRES THAT A WITNESS TO A PARTY PRIMARY PETITION BE ELIGIBLE TO SIGN THE PETITION. THIS IS A QUESTION OF NATIONAL IMPORTANCE. ACCORDINGLY, CERTIORARI SHOULD BE GRANTED. 2

CONCLUSION 12

TABLE OF AUTHORITIES

Cases	Page
Buckley v. American Constitutional Law Foundation, Inc., 525 U.S. 182 (1999)	2, 8, 9
California Democratic Party v. Jones, 530 U.S. 567 (2000)	6
Molinari v. Powers, 82 F. Supp. 2d 57 (E.D.N.Y. 2000)	5
Montano v. Lefkowitz, 575 F.2d 378 (2d Cir. 1978)	7
People v. Rathbone, 145 N.Y. 434 (1895)	7
Rosario v. Rockefeller, 410 U.S. 752 (1973)	6
Schulz v. Williams, 44 F.3d 48 (2d Cir. 1994)	6
Sinclair v. Division of Licensing of Department of State, 96 A.D.2d 1130 (3d Dep't), lve. denied, 60 N.Y.2d 559 (1983)	7
Storer v. Brown, 415 U.S. 724 (1974)	4

Cases **Page**

Sumkin v. Hammonds,
177 Misc. 2d 1006 (Dist. Ct. Nassau
Co. 1998)..... 8

Tashjian v. Republican Party of Conn.,
479 U.S. 208 (1986) 6

Statutes

Election Law §6-132(2) 5, 6, 9, 11

Executive Law §§130, 131 7

Executive Law §135 7

Rules of Federal Procedure,
Rule 12(b)(6) 4

Miscellaneous

Office of Attorney General Eliot Spitzer,
Voting Matters in New York:
Participation, Choice, Action, Ingrity,
February 12, 2001 10

No. 00-

In the
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NEW YORK STATE BOARD OF ELECTIONS,

Petitioner,

v.

ANITA LERMAN, and ANGELO D'ANGELO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF DEFENDANT BOARD OF ELECTIONS OF THE CITY OF NEW YORK IN SUPPORT OF THE PETITION

PRELIMINARY STATEMENT

The Board of Elections of the City of New York (the "City Board"), a defendant and appellee below, submits this brief in support of the New York State Board

of Election's petition for writ of certiorari, in compliance with the request of this Court.[1]

ARGUMENT

THE DETERMINATION OF THE COURT OF APPEALS RAISES THE QUESTION OF WHETHER A STATE ACTS CONSTITUTIONALLY PURSUANT TO THE FIRST AND FOURTEENTH AMENDMENT WHEN IT REQUIRES THAT A WITNESS TO A PARTY PRIMARY PETITION BE ELIGIBLE TO SIGN THE PETITION. THIS IS A QUESTION OF NATIONAL IMPORTANCE. ACCORDINGLY, CERTIORARI SHOULD BE GRANTED.

This case squarely presents the question of the reach of this Court's decision in Buckley v. American Constitutional Law Foundation, Inc., 525 U.S. 182, 231 (1999), as posited by Chief Justice Rehnquist in dissent. Here, the question is whether a residency requirement for witnesses to candidate nominating petitions in a party primary violates the First Amendment as a matter of law.

[1] The City Board did submit briefs in support of its present position regarding New York Election Law §6-132(2) in both the District Court and the Court of Appeals.

The Court of Appeals ruled that it does. The City Board disputes that finding.

Contrary to the Court of Appeals' finding, witnessing initiative petitions is not the equivalent of witnessing candidate-nominating petitions. A ballot initiative is, by its nature, an issue of public interest. Simply presenting the question of whether a particular issue should become law is itself speech about a public issue that is likely to generate additional speech. Generating that discussion can be important to an initiative proponent regardless of whether or not the initiative actually achieves a place on the ballot.

By contrast, for a candidate seeking a party's nomination, the primary goal of a nominating petition is ballot access. There may be some interest in spreading the word that a particular candidate should be elected. However, there is no evidence that circulating a nominating petition is one of the more effective or efficient methods of accomplishing that goal. If access to the ballot is otherwise reasonably feasible, it seems unlikely that a candidate

would complain about a residency requirement for petition witnesses as an infringement on his ability to get his message out.

Nothing in the record here suggests that the residency requirement at issue unreasonably interferes with the effort to place a candidate on the ballot. This Court set forth the standard for evaluating the reasonableness of a regulation's impact on ballot access as follows:

> Could a reasonably diligent independent candidate be expected to satisfy the ... requirements, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot?

Storer v. Brown, 415 U.S. 724, 742 (1974).

Here, the complaint does not allege that the regulation at issue imposes an unreasonable burden on ballot access, and plaintiffs did not submit any evidence in support of such a position to the District Court.[2] To the

[2] This matter was before the Court of Appeals on appeal from the District Court's decision and order granting defendants' motion to dismiss the complaint pursuant to Rule 12(b)(6) of the Rules of Federal Procedure. Plaintiffs did not submit any evidence or argument in opposition to the motion.

extent the Court of Appeals found such a burden, it was only by relying on the factual findings of the District Court in Molinari v. Powers, 82 F. Supp.2d 57 (E.D.N.Y. 2000). Such reliance is misplaced.

That case discussed Election Law §6-132(2) in the very particular circumstances of the 2000 Republican presidential primary. The difficulties at issue there are not applicable to other political races in the state.[3] Indeed, in a somewhat different context, the Second Circuit Court of Appeals noted that a number of independent bodies had succeeded in gaining access to the ballot in New York. Schulz v. Williams, 44 F.3d 48, 56 (2d Cir. 1994). The

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[3] In New York, the election of the Republican nominee for President, though of national interest, was designed as a series of local races for delegates from each of 31 congressional districts. This structure required the organization of each of these districts, including districts where the total number of Republicans is quite small. Taken together with other ballot access requirements, this fragmented structure placed a significant burden on a candidate's ability to secure a place on the ballot. This fragmentation does not affect any other political race in New York. Accordingly, the burden on ballot access presented by §6-132(2) in the 2000 Republican Presidential primary is limited to that contest.

regulation at issue here was in place in the years leading up to the decision in Schulz, and there is no indication that the ability of independent parties to obtain a place on the ballot has changed significantly since then. Accordingly, to the extent the Court of Appeals ruled §6-132(2) unconstitutional as posing an undue burden on ballot access, the Court erred.

Initiative petitions and candidate nominating petitions also differ in that a party primary implicates an associational right to exclude that a ballot initiative does not. This Court has recognized that a political party has the right to determine who will choose its standard bearer with the corresponding right to exclude those with whom it does not want to associate from the decision making process. California Democratic Party v. Jones, 530 U.S. 567 (2000); Tashjian v. Republican Party of Conn., 479 U.S. 208 (1986). This Court has also recognized a legitimate state interest in preventing party raiding. Rosario v. Rockefeller, 410 U.S. 752 (1973).

Similarly, there can be little doubt that only residents of a political subdivision can vote for a representative of that subdivision. See Montano v. Lefkowitz, 575 F.2d 378, 386 (2d Cir. 1978) (primary voters in district entitled to participate independent of "other districts having possibly divergent interests...."). None of these interests come into play when the issue is a ballot initiative of statewide significance.

The City Board submits that the right to limit who chooses the standard bearer for a political party in a political subdivision includes the right to similarly limit who may witness candidate nominating petitions. In this case, the restriction is to members of the party who are residents of the subdivision or notaries public, who act as neutral officials.[4]

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[4] A notary public or commissioner of deeds is a public officer appointed by the secretary of state, upon a determination that he is competent and of good moral character. Executive Law §§130, 131; People v. Rathbone, 145 N.Y. 434 (1895); Sinclair v. Division of Licensing of Dep't of State, 96 A.D.2d 1130 (3d Dep't), lve. denied, 60 N.Y.2d 559 (1983). A notary is empowered to administer oaths and affirmations. Executive Law §135. His

In opposition to the associational right of a particular political subdivision's party's right to limit who may participate in its primary stands the potential witness' right to associate across borders. Certainly, plaintiff Lerman does have a First Amendment right to express her support for the nomination of John Solazzo as council person from the 50th Council District, even though she does not reside in that district. It is considerably less clear that she has a constitutional right to take an active role in actually nominating him to represent a district other than her own. She may desire to do so, and she may have an intellectual interest in the outcome of the election. This does not, however, translate into cognizable interest in participating in another district's election, much less a right to do so.

This points to an additional distinction between the facts of this case and those of Buckley, the primary

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appointment thus authorizes him to act as a neutral witness to sworn documents. See Sumkin v. Hammonds, 177 Misc. 2d 1006 (Dist. Ct. Nassau Co. 1998).

authority on which the Court of Appeals relies. In Buckley, this Court made a distinction between being registered to vote and being eligible to vote. Buckley, 525 U.S. at 194, n. 16. In part, this distinction was based on the finding that the decision not to register to vote could itself have First Amendment significance. Id. at 195. That issue is not present here. In addition, regardless of whether one is registered, a person who is eligible to vote for an initiative will be affected by the result of that vote. By contrast, a resident of the 49th Council District has no cognizable interest in the results of the 50th Council District's election.

The purpose of a candidate-designating petition is to demonstrate that a particular candidate has significant local support, meriting a place on the ballot. Section 6-132(2) promotes this purpose. When those people willing to circulate a petition come from within the relevant subdivision, there is a greater indication of support from within that subdivision than exists when outsiders are circulating petitions to a passive populace.

The residency requirement also assists in the practical protection against fraud. As New York elections are governed, and records kept, largely at the local level, it is easier to verify signatures within a given district than across districts.

The Court of Appeals' finding that the current state of computer technology vitiates this argument is error. While the Boards of Election in New York State are now using signature imaging technology, records, including computer records, are still kept at the county level, except in New York city, where they are kept at the city level. New York has 57 counties outside of New York city. There is no integrated system allowing for the easy verification of signatures from far-flung corners of the state.[5] Accordingly, the Court of Appeals finding that the

[5] The City Board notes that the record before the Court contains no evidence regarding the state of the various county boards' computer systems or how easily information can be shared across counties. Indeed, the New York State Attorney General recently issued a report discussing the fact that counties currently do not have access to a statewide list of registered voters. Voting Matters in New York: Participation, Choice, Action,

residency requirement does not advance the state's interest in preserving the integrity of elections is error.

The residency requirement of §6-132(2) of New York State's Election Law does not severely burden the First and Fourteenth Amendment rights of candidates or potential petition witnesses. Moreover, it protects the associational rights of local political parties, and advances the state interest in preserving the integrity of elections. As the issues raised are unsettled and of national significance, this Court should grant certiorari. Upon a grant of certiorari, this Court should reverse the holding of the Court of Appeals.

Integrity, Office of Attorney General Eliot Spitzer, February 12, 2001 at 12-14.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

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